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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

MARGARETHA WALK, an individual, and MAURICE WALK, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust and VINCENT CIARLANTE,

Petitioners,

vs.

THE BALTIMORE AND OHIO RAILROAD, CHESAPEAKE AND OHIO RAILROAD and THE CSX CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

1. Whether a series of episodes of criminal activity spanning a ten year period involving thousands of investors in four different corporations constitutes only one RICO scheme which is not a sufficient pattern of racketeering activity within the meaning of RICO?

2. Whether the Fourth Circuit's requirement that the RICO conduct alleged also "pose a special threat to social well-being" is unconstitutionally vague?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Statement of Jurisdiction

Jurisdiction in the District Court was based on 18 U.S.C. §1964(a) and on diversity of citizenship under 18 U.S.C. §1332. Jurisdiction in the Court of Appeals for the Fourth Circuit was based on 28 U.S.C. §1291 because the dismissal of the Complaint constituted a final and appealable order.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254(1).

Statute Involved

The text of sections 1961(1), 1961(5), 1962(a), and 1962(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* is reprinted in the Appendix and designated Appendix A.

Statement of the Case

Margaretha and Maurice Walk, as trustees, and Vincent Ciarlante [hereafter collectively referred to as "Walks"], and other minority shareholders of the Baltimore & Ohio Railroad ["B&O"] filed a class action against CSX Corporation and other affiliated corporations ["CSX"] alleging a series of mail fraud and securities fraud transactions spanning a period of ten years taken by CSX against various minority equity holders of its subsidiary corporations.

The *first* scheme was executed on December 13, 1977 and involved the transfer of the majority of the B&O's non-rail assets, including vast real estate holdings, into a shell subsidiary corporation, and the declaration on that same day of a dividend in kind of the subsidiary's stock to the holders of B&O's common stock, without any notice to the B&O's convertible debentureholders. The first scheme described in Walks' Complaint ["Scheme One"] has already been found to be a securities violation directed against hundreds of investors. See generally *Pittsburgh Terminal Corporation v. Baltimore & Ohio R. Co.*, 680 F.2d 933, 943 (3d Cir.), *cert. denied*, 457 U.S. 1056 (1982).

The *second* scheme involved a 1983 merger of one of B&O's major operating railroads, the Western Maryland Railway ["WMR"], into a wholly owned subsidiary of CSX, thereby eliminating all minority shareholder interests in the WMR.

The *third* scheme involved a 1983 merger of the Western Maryland Company ["WMC"], which had no employees and no operations, but owned valuable assets, into another CSX wholly owned subsidiary, thereby eliminating all minority interests in the WMC. A court of appeals suggested that Scheme Three set forth a

violation of the Exchange Act. See *Lockspeiser v. Western Maryland Company*, 768 F.2d 558, 561 (4th Cir. 1985).

The *fourth* scheme involved the elimination of all of the minority shareholder interests in the B&O in a 1987 merger of B&O into another of CSX' wholly owned subsidiaries.

The Walks' Amended Complaint alleged numerous criminal acts of mail fraud and securities fraud by CSX and its affiliates in carrying out the four schemes. The District Court (659 F.Supp. 824 (D.Md. 1987)) found the two RICO counts of Walks' Amended Complaint deficient in four respects:

1. The Complaint failed "to characterize the defendants as persons who regularly commit federally indictable fraud." *Id.* at 825.

2. The Complaint failed to characterize "the railroad defendants as persons whose criminal conduct poses a 'special threat to social well-being.' " Id.

3. "Despite plaintiffs' counsel's ingenuity in identifying multiple fraudulent 'schemes,' . . . there is but one real 'scheme' alleged in this case." *Id.*, and

4. The Complaint "involves ordinary claims of fraud . . . which are best left to state law." *Id.*

The Court of Appeals for the Fourth Circuit affirmed the dismissal (847 F.2d 1100 (4th Cir. 1988)) finding that the Walks had failed to satisfy the pattern of racketeering activity requirement of Sections 1962(a) and (c). *Id.* at 1102. The Fourth Circuit recognized that the RICO issue it was deciding had "bitterly divided the circuits":

> As *Zepkin* and the cases following it illustrate, it is the continuity aspect of *Sedima's* pattern analysis which has given us the greatest difficulty in application. We are not alone in this regard—the proper application of the continuity prong has bitterly divided the circuits. *Id.* at 1103.

The Fourth Circuit admitted its own difficulty in articulating a standard for the pattern of racketeering requirement:

> Since *Sedima*, the lower courts have struggled to give content to the vague notions of 'continuity' and 'relationship that are now considered the distinctive characteristics of the RICO 'pattern.' . . . this task has not been an easy one, for the terms 'relationship' and 'continuity,' as used in *Sedima*, are inherently contradictory. 'Relationship implies that the predicate acts were committed close together in time, involve the same victim or type of misconduct, or both; 'continuity' implies more extended periods of time almost inevitably involving different victims. *Id.* at 1003.

The Fourth Circuit, stating that the Walks' claims present the "closest question yet", found that the Walks had failed to state a claim for relief under RICO because they had not properly alleged a pattern of racketeering activity even though "the predicate acts alleged here span a period of ten years and can be grouped into several distinct 'episodes' of activity, each of which is arguably self-contained." *Id.* at 1104-05.

The Fourth Circuit distinguished between the securities and mail fraud schemes alleged by the Walks and schemes involving other kinds of predicate acts, which it considered to be of a more serious criminal dimension:

> [T]he objective of the related predicate acts is a factor to be considered in assessing the criminal dimension and degree. In this case, that objective is sufficiently limited that we cannot say the related predicate acts suggest ongoing criminal activity of sufficient scope and persistence to pose a special threat to social well-being. *Id.* at 1005.

The Walks filed a petition for rehearing *en banc* to request the entire Court of Appeals to resolve the conflict between the holding of the Panel and the holdings of the majority of the other Courts of Appeals, which was denied by the Fourth Circuit on June 30, 1988.

REASONS FOR GRANTING THE WRIT

1. This Honorable Court has already recognized the need to resolve the differences existing among the Courts of Appeals with respect to RICO's pattern requirement.

On March 24, 1988, this Court granted certiorari in *H.J. Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S.Ct. 1219 (March 21, 1988) (No. 87-1252), in order to review the opinion of the Court of Appeals for the Eighth Circuit dismissing a complaint for failure to allege the "pattern of racketeering activity" requirement of RICO. The Eighth Circuit requires that, in addition to the predicate offenses being alleged, there must be a claim that the predicate offenses constitute multiple schemes and that there is criminal activity other than that relevant to the RICO case being brought.

Other Courts of Appeals have disagreed with the Eighth Circuit's grafting of a multiple scheme requirement onto RICO's pattern requirement, but have disagreed among themselves as to what constitutes a pattern. The Seventh Circuit, for example, attempted to develop a list of factors to be considered in determining whether such a pattern existed:

> Relevant factors include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries. *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986).

The Third Circuit also attempted to objectify the analysis of the pattern requirement:

> [T]he existence of a RICO pattern does not turn on the abstract characterization of racketeering acts as 'continuous' and 'related' but rather on a combination of specific factors such as the number of unlawful acts, the length of time over which the acts were committed, the similarity of the acts, the number of victims, the number of perpetrators, and the character of the unlawful activity. *Barticheck v. Fidelity Union Bank/First Nat. State,* 832 F.2d 36, 39 (3d Cir. 1987).

The Fourth Circuit has rejected any attempt to analyze specific factors in determining the existence of a pattern of racketeering activity. In *Walk,* 847 F.2d at 1104, it stated:

> We did not attempt to identify a range of factors relevant to the continuity inquiry as had the Seventh Circuit in *Morgan,* but we did indicate that the inquiry ought to focus on whether the related predicate acts suggested 'ongoing unlawful activities whose scope and persistence pose a special threat to social well-being.' *Id.*

This Court's clarification of the pattern requirement in *H.J. Inc. v. Northwestern Bell Telephone Company,* may or will resolve the RICO issue presented by this Petition.

It is clear that under the standards articulated for pleading a pattern of racketeering injury in the Third and Seventh Circuits, the Walks' Complaint would not have been dismissed.

The Walks' claims, which were dismissed by the Fourth Circuit, involved more victims, more injuries, more perpetrators and more predicate acts spanning a greater period of time than the pattern of racketeering activity found sufficient by the Seventh Circuit in *Liquid Air Corp. v. Rogers,* 834 F.2d 1297 (7th Cir. 1987) (petition for certiorari filed at No. 87-1262), where that Court stated:

> Therefore, we have a single scheme which lasted seven months and defrauded a single victim. The defendants committed nineteen separate acts, each resulting in use of the mails and use of the wire service. Each time an invoice was falsely prepared, it deprived Liquid Air of its entitlement to rent or replacement value. Therefore, each act resulted in a distinct injury to Liquid Air and a concomitant benefit to D&R. We find that the repeated infliction of economic injury upon a single victim of a single scheme is sufficient to establish a pattern of racketeering activity for purposes of civil RICO. *Id.* at 1304.

See also the following cases where other Courts of Appeals found substantially lesser allegations of racketeering activity to be sufficient to state a claim under RICO: *Barticheck v. Fidelity Union Bank/First Nat. State,* 832 F.2d 36 (3d Cir. 1987) (more than two predicate acts, involving twenty-three investors in a limited partnership scheme); *Yellow Bus Lines, Inc. v. Local Union 639,* 839 F.2d 782, 788-89 (D.C. Cir. 1988) (petition for certiorari filed 88-190) (ten predicate acts, one victim, one scheme); and *Bank of America v. Touche Ross & Co.,* 782 F.2d 966, 970-71 (11th Cir. 1986) (9 predicate acts, 5 victims, 1 scheme).

It is respectfully submitted that this Court should grant the Walks' Petition for Certiorari, and consider their appeal or stay the appeal pending this Court's review of the conflict among the Courts of Appeals as to the requirements of RICO's pattern of racketeering activity in *H.J. Inc. v. Northwestern Bell Telephone Company, supra.*

2. The Fourth Circuit's attempt to distinguish between racketeering activities on the basis of its personal, undefined notions as to what activities "Pose A Special Threat To Social Well-Being" creates an unconstitutionally vague standard of conduct.

The Fourth Circuit has been exceedingly reluctant to accept this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) and to permit civil RICO claims to proceed.

Clearly the Fourth Circuit is dissatisfied with the Congressional inclusion of mail fraud, wire fraud and securities fraud in the predicate acts chosen by Congress in §1961(1) of RICO. In its opinion in this case, it distinguished between white-collar mail or securities fraud schemes and what it perceived to be more serious criminal schemes:

> Virtually every action taken by a controlling majority in the course of its stewardship of a corporation is subject to challenge as either mail or securities fraud. To hold indiscriminately that proof of several such acts occurring over the course of a period of years constitutes a RICO pattern would be to make the statute's extraordinary penalties available to virtually every disgruntled minority shareholder harmed in the process. Such a result would not only have a chilling effect on the transaction of legitimate corporate business, but also sanction a use of the RICO statute that we do not think Congress intended. *Id.* at 1105.

See also the Fourth Circuit's discussion in the opinion below of its prior decision in *International Data Bank v. Zepkin*, 812 F.2d 149 (4th Cir. 1987):

> In *Zepkin* . . . we recognized that a 'single, limited scheme' designed to perpetrate a single fraud should not be transformed into a RICO violation simply

> because the fraud's commission required several acts of mail or wire fraud; such an interpretation would, we thought, virtually read the pattern requirement out of the statute for it is 'the unusual fraud that does not enlist the mails and wires in its service at least twice.' *Id.* at 1104 (citation omitted).

In order to avoid what it feared to be abusive use of RICO against legitimate businesses, and those associated with legitimate businesses, the Fourth Circuit requires that the RICO scheme alleged must "pose a special threat to social well-being." *Id.* at 1105. The Fourth Circuit has not yet reviewed a scheme in a civil RICO action which poses such a special threat to social well-being, since it has not upheld the sufficiency of a single civil RICO complaint, but it has suggested that "a scheme that contemplates a repeated infliction of independent economic injuries—e.g., a series of bank robberies or embezzlements", might satisfy its standard. *Id.* at 1106.

In the Fourth Circuit, the usual mail or wire frauds committed by ordinary white-collar criminals do not appear to be actionable in civil RICO proceedings. *Id.* at 1104. Contrast *United States v. Carter,* 493 F.2d 704 (2d Cir. 1974):

> The fact that the alleged perpetrators are presumably respected and entrusted with responsibility . . . by stockholders does not suggest . . . that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and the wearing of a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit. *Id.* at 708.

The Fourth Circuit's dissatisfaction with the scope of RICO is inconsistent with the statute's scope as drafted. Congress fully appreciated the breadth of RICO's civil provisions. In a law review article by Senator McClellan

(a sponsor of and chair of the subcommittee which wrote the statute) he stated:

> It is impossible to draw an effective statute which reaches most of the commercial activity of organized crime, yet does not include offenses commonly committed by persons outside of organized crime as well. McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame L.Rev. 55, 143-44 (1970).

The Fourth Circuit's engrafting of an additional requirement onto RICO's pattern requirement is inconsistent with *Sedima*, which rejected any judicial amendment of RICO to add amorphous requirements designed at limiting the application of RICO, 473 U.S. at 500, and creates a standard which is unconstitutionally vague. This Court has long recognized the need for criminal statutes to provide reasonable notice of the conduct which they proscribe:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

See also *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), where this Court found unconstitutionally vague a statute penalizing "gangsters."

RICO contains both criminal and civil provisions, which require a uniform interpretation. The pattern of racketeering activity requirement contained in 18 U.S.C. §§1962(a) and (c), applies equally to RICO's criminal provisions. See *Beck v. Manufacturers Hanover Trust Company*, 820 F.2d 46 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988), where the Second Circuit applied its criminal RICO requirements developed in *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), to a civil RICO complaint. See also *United States v. Boyer*, 694 F.2d 58 (3d Cir. 1982), where the Third Circuit stated:

> The standard of proof for civil liability in fraud is lower than the proof beyond a reasonable doubt required for a criminal conviction. But there is no reason to suppose that in enacting criminal statutes prohibiting mail fraud or securities fraud the Congress intended that the substantive element of the offense—the scienter—should be different than for civil liability for fraud. *Id.* at 60.

The Fourth Circuit's announcement below that it will determine on a case by case basis whether "the related predicate acts suggest ongoing criminal activity of sufficient scope and persistence to pose a special threat to social well-being" renders RICO's pattern of racketeering requirement unconstitutional in its application. Significantly, the Fourth Circuit has failed to mention this requirement in its affirmance of criminal RICO convictions. *United States v. Griffin*, 660 F.2d 996 (4th Cir. 1981) and *United States v. Tillett*, 763 F.2d 628 (4th Cir. 1985). The standard provides no guidance to those whose conduct it seeks to prevent.

In fact, the purpose of the standard appears to be to permit the court to arbitrarily select from among those engaging in RICO predicate acts the defendants against whom the court will permit civil actions to be brought:

> The intent of Congress is not that RICO be used under all circumstances. Its intent is that RICO be used against racketeers, individuals who earn their livelihood through the repetitive and continuous commission of criminal acts. The statute, properly read, is not a "catch-all," but is instead a powerful tool to be used against racketeers and organized crime. Too frequently, this statute is used by attorneys against legitimate businesses. . . . *Gatoil (U.S.A.), Inc. v. Forest Hill State Bank*, No. 86-3579 (Unpublished). 6 RICO L.Rptr. 316, 321 (4th Cir. June 17, 1987).

This case provides yet another example where the Fourth Circuit is excluding those associated with "legitimate" businesses who violate the wire, mail and securities laws from the scope of RICO.

This Court should grant the Walks' petition for certiorari and reverse the Fourth Circuit's dismissal of the Walks' Complaint on the grounds that RICO's pattern of racketeering requirement does not additionally require a determination by a court that the conduct alleged poses "a special threat to social well-being."

Conclusion

For the reasons stated above, Petitioners Margaretha Walk, Maurice Walk, as Trustee, and Vincent Ciarlante, respectfully request this Honorable Court to grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

Text of Sections 1961(1), 1961(5), 1962(a), and 1362(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.*

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means . . . *** (B) any act which is indictable under any of the following provisions of title 18; . . . *** section 1341 (relating to mail fraud), section 1343 (relating to wire fraud),

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of

Appeal A—Text of Sections 1961(1), 1961(5), 1962(a), and 1962(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq.

such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . . *** controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

* * *

APPENDIX B

Opinion of the United States District Court for the District of Maryland (1987)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARETHA WALK, an Individual, and MAURICE WALK, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust, and VINCENT CIARLANTE,

v.

THE BALTIMORE AND OHIO RAILROAD, THE CHESAPEAKE AND OHIO RAILROAD and the CSX CORPORATION.

Civil No. S 87-488

John B. Isbister, Esq., Tydings & Rosenberg, of Baltimore, Maryland, and Michael P. Malakoff, Esq. and Ellen M. Doyle, Esq., Berger, Kapetan, Malakoff & Meyers, P.C., of Pittsburgh, Pennsylvania, for plaintiffs.

Richard Magid, Esq., Ward B. Coe, III, Esq., and William F. Ryan, Esq., Whiteford, Taylor & Preston, of Baltimore, Maryland, for defendants.

Smalkin, District Judge.

Filed: May 6th, 1987.

Appendix B—Opinion of the United States District Court for the District of Maryland (1987).

This is a three-count civil action before the Court on a pre-answer amended complaint, filed pursuant to 28 U.S.C. §§1331 and 1332, by minority shareholders of the B&O Railroad. (They seek class action status.) The first two counts claim civil violations of the Racketeer Influenced and Corrupt Organizations [RICO] statute, 18 U.S.C. §1961 *et seq.* The third count claims violation of a state-law based fiduciary duty owed to the minority B&O shareholders by the defendant C&O, and its parent CSX, as owners of the majority interest in B&O. The matter is now before the Court on the defendants' motion to dismiss the amended complaint, which has been briefed and opposed. No oral argument is necessary. Local Rule 6, D. Md.

The Court is convinced beyond a doubt, *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that this complaint fails to state a civil RICO claim under 18 U.S.C. §1962, because it does not allege, nor could it be further amended to allege, a legally sufficient "pattern of racketeering activity." Although the complaint recites a prolix catalogue of events and "schemes" going back many years (to 1977) and involving a number of persons and entities other than B&O minority shareholders, it shows no "pattern of racketeering activity" as that statutory RICO requirement has been interpreted in the Fourth Circuit. In *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149 (4th Cir. 1987), the Court stated that the "pattern of racketeering activity" requirement was intended to limit civil RICO to "those cases in which racketeering acts are committed in a manner characterizing the defendant as a person who regularly commits" certain crimes. Clearly, this complaint is

inadequate to characterize the defendants as persons who regularly commit federally indictable fraud. In fact, the discrete predicate acts of criminal fraud apparently alleged in this complaint include only certain activities pertaining to debenture holders in 1977, already the subject of another lawsuit, and the mailing of a supplemental brief in that lawsuit in 1982 (Amended Complaint, ¶¶32-36), the mailing of two proxy statements on March 18, 1983 (*Id.*, ¶¶40, 46), and the mailing of a press release and notice pertaining to the challenged merger. (*Id.*, ¶¶58, 61). As noted by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 105 S. Ct. 3275, 3285 n.19 (1985), two predicate criminal racketeering acts are necessary, but not sufficient, to make out a pattern of racketeering activity. In the Fourth Circuit, what suffices has been settled by *International Data Bank*:

> What constitutes a RICO pattern is thus a matter of criminal dimension and degree. To allow a "pattern of racketeering" to flow from a single, limited scheme such as this one would undermine Congress' intent that RICO serve as a weapon against ongoing unlawful activities whose scope and persistence pose a special threat to social well-being. The present case does not involve a "pattern of racketeering," but ordinary claims of fraud best left to "the state common law of frauds" and to "well-established federal remedial provisions."

812 F.2d at 155.

Despite plaintiffs' counsel's ingenuity in identifying multiple fraudulent "schemes," as portrayed in their dismissal opposition (filed May 5, 1987) at 3-4, there is but one real "scheme" alleged in this case, and that has to do with the valuation of minority shares and the

treatment of minority shareholders in the B&O. The carefully sifted sands through which plaintiffs have combed to find their "schemes" do not form any firm foundation for characterizing the railroad defendants as persons whose criminal conduct poses a "special threat to social well-being." *Id.* In short, this case involves ordinary claims of fraud, and no more, which are best left to state law. Thus, it fails to state a claim under RICO, and counts 1 and 2 will be dismissed by an order to be entered separately, for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Count 3 alleges breach of fiduciary duty to minority shareholders, but it utterly fails to show any legally cognizable, timely-asserted injury to them short of the allegedly less-than-fair value presently being offered for their stock. The claims relating to the treatment of B&O minority shareholders arising from or at issue in the "PTC" litigation are clearly barred by limitations or are foreclosed by the judgment rendered March 31, 1987 by the United States District Court for the Northern District of Ohio in *Pittsburgh Terminal Corp. v. The Baltimore and Ohio Railroad, et al.*, Civil No. C 84-1267, a situation that plaintiffs' opposition does not address. This Court is of the opinion that the remaining claim in the third count, *viz.*, freeze-out of minority shareholders at an inadequate price (which is the only claim really at issue, *see, e.g.*, plaintiffs' opposition at 31, first full paragraph), is not cognizable under Maryland law as pleaded, because the plaintiffs can avail themselves of the remedy of appraisal, as provided in *Md. Corps. & Assn's Code Ann.* §§3-106 and 3-201—3-212 (1957, 1985 Repl. Vol.).

Appendix B—Opinion of the United States District Court for the District of Maryland (1987).

Although Judge Miller of this Court recognized that the sole minority shareholder of a Maryland corporation in a short-form merger might have a cause of action for breach of fiduciary duty in *very* limited circumstances, *Twenty Seven Trust v. Realty Growth Investors,* 633 F. Supp. 1028, 1037-9 (D. Md. 1982), he held that "inadequacy of price [offered for minority shares] alone does not warrant court intervention in corporate affairs." *Id.* at 1039, *citing Homer v. Crown, Cork & Seal Co.,* 155 Md. 66, 79-86, 141 A. 424, 431-34 (1928). *Homer* is still good law in Maryland. *See Lerner v. Lerner,* 306 Md. 771, 780-81 (1986). Here, inadequacy of the price being offered for the minority shares is the only *real* issue in Count III, and the non-statutory cause of action pleaded therein is not recognized in Maryland law. In the language of *Homer* itself, the question is whether, on a reading of the entire complaint, it appears to the court that "the fundamental issue thus made is not fraud but a debatable controversy over value. . . ." 155 Md. at 80. If fraud is not the fundamental issue, then, under *Homer,* the statutory appraisal is the exclusive remedy. A close reading of the amended complaint's attempted particularizations of "fraud" in connection with the merger, at ¶¶71-73, shows that these claims are no more than conclusory disagreements with income and asset valuations, stock valuations, and methods of accounting, which fall far short of establishing the requisite fraud under *Homer* to warrant an injunction against the merger. Looking at the individual allegations of fraud, the short-line sale contention of ¶71.a. does not, by itself or in conjunction with ¶67, adequately demonstrate the requisite fraud under *Homer,* because, *inter alia,* there is no allegation that the intention to sell short lines was in

fact *in esse* before the merger price was announced. The allegations of failure to make public projections of income and late reporting of income do not adequately plead the requisite fraud. (There is no duty to make public projections of income identified by plaintiffs under Maryland law.) Thus, ¶71.b. does not make out a sufficient case of fraud under *Homer.* Paragraph 72 attacks the integrity of the independent financial advisor, not of defendants, and there is no sufficient allegation of a duty on the part of defendants to make disclosures of Morgan Stanley's activities so as to make out a case of fraud under *Homer.* Whether taken alone or together, these attempted allegations of fraud convince the Court that fraud is not the essence of the plaintiffs' claim. Rather, here, as in *Homer,* the fundamental issue is inadequate price, and the few acts of "fraud" identified by plaintiffs are insufficient, as a matter of law, to make out together or separately the species of fraud required to be shown before a Maryland equity court will enjoin a short form or "cashout" merger. Because the statutory appraisal mechanism is not pleaded by plaintiffs here, and because it constitutes an adequate and exclusive remedy under Maryland law as applied to the facts of this case, plaintiffs' third claim also fails to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6), and it, too, will be dismissed by the Order accompanying this Memorandum Opinion.

FREDERIC N. SMALKIN
United States District Judge

Appendix B—Opinion of the United States District Court for the District of Maryland (1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARGARETHA WALK, an Individual, and MAURICE WALK, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust, and VINCENT CIARLANTE,

v.

THE BALTIMORE AND OHIO RAILROAD, THE CHESAPEAKE AND OHIO RAILROAD and the CSX CORPORATION.

Civil No. S 87-488

ORDER

For the reasons stated in the foregoing Memorandum Opinion, IT IS, this 6th day of May, 1987, by the Court, ORDERED:

1. That plaintiffs' amended complaint BE, and the same hereby IS, DISMISSED, for failure to state a claim upon which relief can be granted; and

2. That the Clerk of Court mail copies of the foregoing Memorandum Opinion and of this Order to counsel for the parties.

FREDERIC N. SMALKIN
United States District Judge

APPENDIX C

Opinion of the United States Court of Appeals for the Fourth Circuit (1988)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3585

Margaretha Walk, an individual; Maurice Walk, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust and the Margaretha Walk Trust; Vincent Ciarlante,

Plaintiffs-Appellants,

versus

The Baltimore and Ohio Railroad;
Chesapeake and Ohio Railroad;
The CSX Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Frederic N. Smalkin, District Judge. (CA-87-488-S)

Argued January 6, 1988. Decided May 31, 1988

Before WINTER, Chief Judge, and PHILLIPS and MURNAGHAN, Circuit Judges.

Appendix C—Opinion of the United States Court of Appeals for the Fourth Circuit (1988).

Ellen M. Doyle (Michael P. Malakoff; Berger, Kapetan, Malakoff & Meyers, P.C.; John B. Isbister; Tydings & Rosenberg on brief) for Appellants; Ward Baldwin Coe, III (Wilbur D. Preston, Jr.; Richard J. Magid,; William F. Ryan, Jr.; Whiteford, Taylor & Preston; Alan A. Rudnick, General Counsel, CSX Corporation on brief) for Appellees.

PHILLIPS, Circuit Judge:

Following the announcement by CSX Corp. (CSX) of a statutory short-form merger of one of its subsidiaries, the Baltimore & Ohio Railroad (B&O), into another, the Chesapeake & Ohio Railroad (C&O), appellants Margaretha Walk, Maurice Walk, and Vincent Ciarlante (the plaintiffs), as representatives of a putative class of minority shareholders in B&O, brought this action challenging the merger. The complaint, which named as defendants B&O, C&O, and CSX, alleged civil RICO violations and breach of state law fiduciary duty. The district court dismissed the action under Fed. R. Civ. P. 12(b)(6), concluding that the complaint alleged neither a sufficient pattern of racketeering activity to state a civil RICO claim nor sufficient fraud to state a claim for breach of fiduciary duty under state law. We affirm.

I

The facts alleged by the plaintiffs, which we must take as true for the purposes of ruling on this 12(b)(6) motion, are essentially as follows.

B&O is a Maryland railroad corporation in which the plaintiffs hold minority interests. Approximately 98.5% of the outstanding shares of B&O's common and

preferred stock is owned by C&O, a Virginia corporation. C&O in turn is a wholly-owned subsidiary of CSX Corporation, a Virginia holding company that owns a number of transportation, real estate, and mining concerns in the eastern seaboard region. Through its ownership of C&O, CSX dominates and controls the operations and financial affairs of B&O and its subsidiaries.

Prior to 1977, B&O owned substantial non-rail assets, including a large amount of potentially profitable real estate. CSX wished to develop these non-rail assets free from the claims of B&O's minority shareholders. To accomplish that goal, CSX in 1977 directed B&O to transfer virtually all its non-rail assets to its wholly-owned subsidiary, Mid-Allegheny Corp. (MAC). Following this transfer, CSX distributed the MAC stock to B&O's common shareholders as a dividend-in-kind, without giving advance notice of the proposed dividend to the holders of debentures convertible into B&O common stock. The effect of this transaction was to deprive the B&O debentureholders, who counted among their number the representative plaintiffs, of the opportunity to convert before the record date and thereby to share in the anticipated profits from the development of B&O's non-rail assets.[1]

[1] The plaintiffs also allege that between 1961 and 1978, CSX and C&O tricked large numbers of B&O debentureholders into selling their debentures to B&O at less than face value, by directing B&O not to pay dividends on its common stock.

Over the next several years, CSX transferred most of MAC's non-rail assets to other CSX affiliates. Between 1978 and 1979, CSX directed MAC's board of directors, which it controlled, to approve the sale of much of MAC's real estate to other CSX affiliates, allegedly at prices below fair value. In February 1983, CSX directed MAC's board of directors to approve the sale of MAC's controlling interest in the Western Maryland Co. (WMC), a profitable timber and mineral leasing concern, to another wholly-owned subsidiary of CSX, CSX Minerals, Inc. (CSX-M). This sale was also allegedly at a price below fair value. CSX then carried out a merger of WMC into CSX-M, and in connection with this merger, sent WMC's shareholders a proxy statement which allegedly contained various fraudulent misrepresentations and omissions.

CSX then began to spin off B&O's rail assets. In February 1983, it directed B&O's board of directors, which it controlled, to approve the sale of B&O's controlling interest in the Western Maryland Railroad Company (WMR) to B&O's parent, C&O, at a price allegedly below fair value. Following the sale, CSX engineered a merger of WMR into C&O and, in connection with this merger, mailed WMR's shareholders a proxy statement which allegedly contained various misrepresentations and omissions. CSX also endeavored to depress B&O's earnings, by shifting certain costs incurred in other CSX subsidiaries to it.

Finally, CSX proposed to rid itself of B&O's minority shareholders altogether by merging B&O into its parent corporation, C&O. It is this proposed merger which the plaintiffs, whose interests it would cash out, challenge in

this action. Because C&O owned more than 90% of the outstanding common stock of B&O, CSX was able to carry out the merger without securing shareholder approval, under Md. Corps. & Ass'ns Code Ann. §3-106. In connection with the merger, the plaintiffs allege that CSX made several false representations as to the value of B&O's assets, in order to induce them to accept less than the fair value of their stock as a cash-out price.

Shortly after the proposed merger was announced, the plaintiff minority shareholders filed actions against B&O, C&O, and CSX in both state and federal court. The state court complaint alleged essentially that the merger had no proper business purpose, that the price offered for the minority shares was grossly inadequate, and that C&O and CSX had breached the fiduciary duty they owed B&O's minority shareholders, as holders of the majority interest in B&O, by engaging in "unfair dealing, coercion, deception, manipulation, and gross and palpable overreaching tantamount to fraud." The complaint sought both injunctive relief against the merger and damages for the losses allegedly suffered by the plaintiffs as a result of it.

The amended federal complaint, which is the subject of this appeal, contains three counts. The first two counts attempt to state civil RICO claims under 18 U.S.C. §§1962(c) and 1962(a). Both counts are based on allegations that the defendants conceived an elaborate scheme to deprive B&O's minority shareholders of their right to participate in the profits from B&O's growth through a series of complex corporate transactions spanning more than a decade, that they committed numerous acts of mail fraud in furtherance of this

scheme, and that these acts constitute a "pattern of racketeering activity" under 18 U.S.C. §1961. The third count attempts to state a claim against C&O and CSX for breach of fiduciary duty under state law. Like its state counterpart, the federal complaint seeks both injunctive relief against the merger and damages based on it.

In early April 1987, the state court denied the plaintiffs' request for injunctive relief against the merger, finding the dispute to be essentially one over the value of the minority stock, which could adequately be dealt with in the statutory appraisal proceeding. The plaintiffs moved for leave to file an amended complaint setting out the allegations of fraud in greater detail. The state court denied this motion. The plaintiffs appealed to the Maryland Court of Special Appeals, which affirmed the denial of leave to amend, finding that even with the proposed amendments, the complaint failed to state a claim for relief under state law. Further appeal is now pending within the state court system.

On April 30, 1987, the merger was consummated, mooting the plaintiffs' request for prospective injunctive relief in this action. Shortly thereafter, the district court dismissed the federal action for failure to state a claim. The court reasoned that the first two counts of the amended complaint failed to allege a sufficient pattern of racketeering activity to state a civil RICO claim, and that the third count failed to allege the sort of fraud necessary to support a claim for breach of fiduciary duty under state law. This appeal followed.

II

18 U.S.C. §1964 enables a private plaintiff to bring a civil action for treble damages based on a violation of §1962. In this case, the plaintiffs' complaint attempts to assert civil RICO claims under both §1962(c) and §1962(a). A crucial element of the claim under both sections is the existence of a "pattern of racketeering activity." The district court held that neither of the RICO counts here alleged a legally sufficient pattern of racketeering activity and dismissed on that ground. We agree.[2]

The RICO statute defines a "pattern of racketeering activity" simply as "at least two" acts of racketeering activity within ten years of each other. 18 U.S.C. §1961(5). Our current interpretation of this rather sparse statutory definition has its genesis in the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). There the Court rebuffed a movement

[2] On appeal, the defendants argue that the dismissal of the civil RICO counts may also be upheld on several other grounds not reached by the district court: (1) failure to allege with sufficient particularity at least two predicate acts of racketeering activity; (2) failure to allege an "enterprise" separate and distinct from the "persons" who committed the alleged RICO violations; (3) failure to allege an adequate nexus between the persons, the enterprise, and the alleged pattern of racketeering activity; (4) failure to allege injury to business or property as a result of the alleged RICO violations; and (5) that the plaintiffs, as individual shareholders, lack standing to sue because any injuries they suffered were merely derivative of the injury to the corporation itself. Because we agree with the district court that the allegations in the complaint, even if true, would fail to establish a pattern of racketeering activity, we do not address the other grounds for dismissal advanced by the defendants.

then afoot in the lower courts to limit the scope of the civil RICO provisions by reading in restrictions that do not appear on the face of the statute, such as a requirement that the plaintiff have suffered a special "racketeering injury." At the same time, however, the Court suggested that lower courts might properly curb the abuse of civil RICO by more careful delineation of the "pattern" requirement. *Id.* at 500. Exploring the pattern concept in dicta, the Court suggested that while two acts of racketeering activity are necessary to form a pattern, they are generally not sufficient. *Id.* at 496 n.14. Because the legislative history indicates that RICO was not meant to target "sporadic" or "isolated" instances of racketeering activity, the Court said, predicate acts constitute a pattern only when they reflect both "continuity" and "relationship." *Id.*, quoting S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969).

Since *Sedima*, the lower courts have struggled to give content to the vague notions of "continuity" and "relationship" that are now considered the distinctive characteristics of the RICO pattern." As the Seventh Circuit has remarked, *see, e.g., Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986), this task has not been an easy one, for the terms "relationship" and "continuity," as used in *Sedima*, are inherently contradictory. "Relationship" implies that the predicate acts were committed close together in time, involve the same victim or type of misconduct, or both; "continuity" implies more extended periods of time almost inevitably involving different victims. *Id.* An excessive focus on either factor in a given fact situation may effectively eliminate the other. *Id.*

Recognizing this conceptual tension, we held in *International Data Bank v. Zepkin*, 812 F.2d 149 (4th Cir. 1987), that the existence of a RICO pattern must be determined on a case-by-case basis, rather than by reference to any set of mechanical rules. *Id.* at 154-55. Under this flexible standard, what constitutes a RICO pattern is thus "a matter of criminal dimension and degree," to be dealt with by reference to the facts and circumstances of each particular case. *Id.* at 155.

As *Zepkin* and the cases following it illustrate, it is the continuity aspect of *Sedima's* pattern analysis which has given us the greatest difficulty in application. We are not alone in this regard—the proper application of the continuity prong has bitterly divided the circuits. The Eighth Circuit has held that the continuity necessary to establish a pattern is not present when the predicate acts alleged were all committed in furtherance of a single continuing scheme. *See, e.g., Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986). The Second and Eleventh Circuits, by contrast, have focused solely on the number of related predicate acts, without regard to the existence of separate "schemes." *See, e.g., United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986). The Seventh Circuit has taken a middle stance, holding that related predicate acts may reflect sufficient continuity to establish a pattern, even if they can be characterized as part of a single scheme, if they are "ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, i.e., 'transactions "somewhat separated in

time and place." ' " *Morgan*, 804 F.2d at 975 (quoting *Graham v. Slaughter*, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (quoting *United States v. Moeller*, 402 F. Supp. 49, 57-58 (D. Conn. 1975))). In making this determination, the Seventh Circuit has looked to the number and variety of the predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes, and the occurrence of distinct injuries. *Id.*

In *Zepkin*, we adopted a flexible approach to the continuity inquiry not unlike that enunciated by the Seventh Circuit in *Morgan*. We agreed that the mere fact that the predicate acts alleged can properly be characterized as part of a single ongoing "scheme" should not automatically prevent them from constituting a pattern. 812 F.2d at 155. On the other hand, we recognized that a "single, limited scheme" designed to perpetrate a single fraud should not be transformed into a RICO violation simply because the fraud's commission required several acts of mail or wire fraud; such an interpretation would, we thought, virtually read the pattern requirement out of the statute, for it is "the unusual fraud that does not enlist the mails and wires in its service at least twice." *Id.* at 154-55. We did not attempt to identify a range of factors relevant to the continuity inquiry, as had the Seventh Circuit in *Morgan*. But we did indicate that the inquiry ought to focus on whether the related predicate acts suggested "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *Id.* at 155.

Appendix C—Opinion of the United States Court of Appeals for the Fourth Circuit (1988).

The complaint in *Zepkin* alleged that the defendants had committed multiple acts of securities fraud by issuing a misleading prospectus to ten inventors in connection with a single stock offering. We found this insufficient to satisfy the continuity aspect of the pattern requirement because the predicate acts alleged were all designed to perpetrate a single fraud. *Id.* at 154-55. As we later explained, the multiplicity of the predicate acts in *Zepkin* was more a reflection of the nature of the underlying transaction—a securities deal which produced numerous pieces of paper—than of the scope and persistence of the criminal activity involved. *See HMK Corp. v. Walsey,* 828 F.2d 1071, 1974 (4th Cir. 1987) (quoting *Morgan,* 804 F.2d at 976). Predicate acts must be viewed in context, we stressed; the mere fact that a particular transaction generates numerous pieces of paper—and hence the potential for a greater number of related predicate acts—does not necessarily mean that those predicate acts in combination pose a special threat to social well-being. *Id.; see Morgan,* 804 F.2d at 976.

In *HMK Corp. v. Walsey,* 828 F.2d 1071 (4th Cir. 1987), we took the analysis a step further. There the complaint alleged that the developer defendants had made a series of misrepresentations to government officials in order to influence zoning decisions regarding a certain tract of land. Unlike the predicate acts in *Zepkin,* which occurred close together in time and were related to a single transaction, these predicate acts spanned a period of four years and could be grouped into several distinct "episodes" of activity somewhat separated in time and space. For this reason, the plaintiffs argued that the predicate acts reflected the

continuity necessary to make out a pattern. In rejecting this argument, we again emphasized the importance of context. On the facts of that case, we thought both the number of predicate acts and the length of time they spanned to be more a reflection of the peculiar context in which they had occurred—a protracted zoning dispute that required the involvement of many different governmental decisionmakers—than of criminal activity that posed a special threat to social well-being. *Id.* at 1074-76. We emphasized that the determination of whether particular predicate acts reflect "continuous" criminal activity cannot be made in a vacuum, but must take into account the inherent characteristics of the situation in issue. *Id.* at 1075.

This case presents the closest question yet, for the predicate acts alleged here span a period of ten years and can be grouped into several distinct "episodes" of activity, each of which is arguably self-contained. Indeed, the plaintiffs contend that these different "episodes" of fraudulent activity reflect the existence of at least four separate and distinct "schemes." The first such "scheme" is said to involve the 1977 transfer of B&O's non-rail assets to MAC and the subsequent declaration of the dividend in MAC stock without advance notice to the B&O debentureholders. The second and third "schemes" involve the 1983 freezeouts of the minority shareholders in two B&O subsidiaries, WMR and WMC; the fourth centers around the current effort to freeze out the minority shareholders in B&O itself. *See* Appellant's Brief at 5-7. The plaintiffs contend that the existence of these separate "schemes" demonstrates the continuity necessary to make out a RICO pattern.

Appendix C—Opinion of the United States Court of Appeals for the Fourth Circuit (1988).

We disagree. Even assuming that the allegations made here are legally sufficient to plead multiple acts of mail fraud—an issue we do not decide—we are not persuaded that the conduct thus alleged reveals sufficient continuity to establish a pattern, as that concept has been worked out in our cases. As the district court noted—and the plaintiffs' own complaint asserts repeatedly[3]—each of these allegedly separate "schemes" or "episodes" of fraudulent activity was merely another step toward the accomplishment of a single, limited goal: getting rid of the outside minority interests in B&O. There was in reality but a single "scheme" to inflict a single basic injury. Here, as in *HMK*, the number of predicate acts and the length of time over which they occurred are more a reflection of the peculiar context in which the activity occurred—a lengthy and bitter battle for control of a large corporate entity—than of ongoing criminal conduct whose scope and persistence poses a special threat to social well-being. Virtually every action taken by a controlling majority in the course of its stewardship of a corporation is subject to challenge as either mail or securities fraud. To hold indiscriminately that proof of several such acts occurring over the course of a period of years constitutes a RICO pattern would be to make the statute's extraordinary penalties available to virtually every disgruntled minority shareholder harmed in the process. Such a result would not only have a chilling effect on the transaction of legitimate corporate business, but also sanction a use of the RICO statute that we do not think Congress intended.

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[3] See Joint Appendix 3A-4A; 7A; 35A.

We do not, of course, mean to suggest that a single ongoing scheme of racketeering activity can never constitute a pattern when it occurs in the corporate context. Indeed, one of the most obvious examples of a RICO pattern—a scheme that involves setting up a series of shell corporations, selling stock in them by means of various false representations, and then disappearing with the proceeds—occurs in the corporate context. Such an open-ended scheme contemplating the repeated infliction of independent economic injuries on an indiscrimnate number of victims may well pose a special threat to social well-being. We hold only that this *particular* scheme, limited in scope to the accomplishment of a single discrete objective—forcing out the minority in a single corporate structure—does not pose a sufficient threat of continuing criminal activity to justify imposition of RICO's extraordinary penalties. Though the activity engendered by this scheme was spread out over time, it was undertaken merely as a means to the accomplishment of that single end, and there is nothing to suggest that it would have continued for a moment longer than was necessary to accomplish it. Viewed in context, the separate acts emerge as no more deleterious than the multiple mailings in furtherance of the single discrete transaction in *Zepkin*. Such allegations of multiple preparatory acts leading up to the infliction of a single basic injury are simply not the stuff of which RICO patterns are made. *See*, e.g., finding similar allegations insufficient to meet *Sedima's* continuity requirement, *Medical Emergency Serv. Assoc. v. Foulke*, _____ F.2d _____ (7th Cir. Mar. 25, 1988) (multiple acts of mail fraud leading up to infliction of single injury, the displacement of plaintiff as

provider of emergency services); *Marks v. Pannell Kerr Forster,* 811 F.2d 1108, 1110-12 (7th Cir. 1987) (multiple fraudulent acts designed to inflict single injury on single victim); *Skycom Corp. v. Telstar Corp.,* 813 F.2d 810, 818 (7th Cir. 1987) (multiple fraudulent representations leading up to formation of single contract and transfer of single business opportunity); *Torwest DBC, Inc. v. Dick,* 810 F.2d 925, 928-29 (10th Cir. 1987) (allegations of multiple fraudulent acts designed to permit corporate insiders to recover illegal profits from sale of single piece of property); *Elliott v. Chicago Motor Club Ins.,* 809 F.2d 347, 349-50 (7th Cir. 1986) (multiple acts of mail fraud designed to defraud plaintiff in relation to single insurance claim); *see also Montesano v. Seafirst Comm. Corp.,* 818 F.2d 423, 426 (5th Cir. 1987) (Higginbotham, J.) (suggesting similar analysis).

We wish to emphasize that by focusing on the ultimate objective of the related predicate acts at issue, we are not holding that it is necessary to show more than one fraudulent "scheme" or criminal "episode" to establish a pattern. Such an approach is, in our judgment, utterly indefensible after *Sedima,* for the RICO statute itself contains no requirement of multiple "schemes" or "episodes." Nor do we mean to suggest that related predicate acts may always avoid RICO liability by the "semantical game of generalizing the[ir] illegal objective." *See Montesano,* 818 F.2d at 426. Quite plainly, a scheme that contemplates the repeated infliction of independent economic injuries—e.g., a series of bank robberies or embezzlements—should not escape characterization as a pattern simply because each

criminal act shares the same general objective—the robbing of banks or the embezzlement of funds. Schemes such as these, which involve the repeated infliction of independent economic injuries—and thus the reaping of independent illegal benefits—are precisely the sort of ongoing criminal activity to which *Sedima's* continuity requirement is addressed. *See, e.g., Liquid Air Corp. v. Rogers,* 834 F.2d 1297, 1303-05 (7th Cir. 1987) (allegations that defendants mailed 19 different false shipping invoices over period of seven months to document shipments that were never made were sufficient to satisfy continuity requirement, because each false invoice was a separate fraud resulting in an independent economic injury and concomitant illegal benefit); *Illinois Dept. of Revenue v. Phillips,* 771 F.2d 312, 313 (7th Cir. 1985) (allegations that defendant mailed nine separate fraudulent sales tax returns to the state over a nine-month period were sufficient to constitute pattern). We hold only that the objective of the related predicate acts is a factor to be considered in assessing the criminal dimension and degree. In this case, that objective is sufficiently limited that we cannot say the related predicate acts suggest ongoing criminal activity of sufficient scope and persistence to pose a special threat to social well-being.

III

We turn next to Count III of the amended complaint, which attempts to assert a claim for breach of fiduciary duty under state law. Under Maryland law, a minority shareholder who objects to the price offered him by the majority in a §3-106 merger may elect instead to receive

the fair value of his stock through the appraisal process set forth in Md. Corps. & Ass'ns Code Ann. §§3-201 to -213. Md. Corps. & Ass'ns Code Ann. §§3-106(d)(2). The statute itself does not indicate whether this appraisal proceeding is the exclusive remedy available to a dissenting minority shareholder in a §3-106 merger. Maryland's highest court has not specifically addressed this issue, but it has indicated that minority shareholders may, under certain circumstances, obtain equitable relief against similar "freezeout" maneuvers, notwithstanding the existence of the statutory appraisal remedy. *See Lerner v. Lerner,* 511 A.2d 501, 505-06 (Md. 1986); *Homer v. Crown Cork & Seal Co.,* 141 A. 425, 432 (Md. 1928); *see also Twenty Seven Trust v. Realty Growth Investors,* 533 F. Supp. 1028, 1034-36 (D. Md. 1982) (applying Maryland law). Drawing on these precedents, Maryland's intermediate appellate court has recently held that dissenting minority shareholders may, under certain limited circumstances, obtain equitable relief against a §3-106 freezeout merger, despite the existence of the statutory appraisal remedy. *Walter Schloss Assoc. v. The Chesapeake & Ohio Ry.,* No. 710, Sept. Term 1977, slip op. at 14-15 (Md. Ct. Spec. App. Jan. 20, 1988). While the *Schloss* decision is of course not binding on us, we think it represents the best available prediction of the position the Maryland Court of Appeals would likely take on the issue. We therefore assume, as did the district court, that Maryland law permits a dissenting minority shareholder to obtain equitable relief against a §3-106 freezeout merger, in certain circumstances.

Identifying the circumstances under which such relief is available, however, is a much more difficult task. In *Homer*, the Court of Appeals held that an allegation that the price offered for minority shares was "grossly inadequate" would not justify equitable relief because such a claim could be fairly resolved in the statutory appraisal proceeding. 141 A.2d at 432. Equitable relief was warranted, the court held, only where there was "fraud" on the part of the majority or the officers and directors it controlled. *Id.* But the *Homer* court recognized that allegations of "fraud" are often nothing more than disagreements about methods of valuation, which are more appropriately resolved in the statutory appraisal proceeding. It therefore directed courts to view allegations of fraud with suspicion and to deny equitable relief "if, on consideration of all the allegations of the bill of complaint, it appear[s] that the fundamental issue thus made is not fraud, but a debatable controversy over value." *Id.* To take the case out of the appraisal statute, the court held, the fraud must be "affirmatively shown." *Id.* Applying this careful scrutiny to the allegations of fraud in the complaint before it, the court found them to be in essence nothing more than a complaint about the method by which the value of the minority shares was calculated. Since this dispute could adequately be resolved in a statutory appraisal proceeding, the court found the allegations insufficient to state a claim for equitable relief. *Id.* at 433-34.

Homer was decided in 1928, and the general body of corporate law has changed a great deal in the intervening years. During the 1970s, many courts held that minority

shareholders could obtain equitable relief against freezeout mergers upon a showing that the merger had no legitimate "business purpose" other than to force out the minority. *See, e.g., Singer v. Magnavox Co.*, 380 A.2d 969, 980 (Del. 1977). In *Weinberger v. UPO, Inc.*, 457 A.2d 701 (Del. 1983), the Delaware Supreme Court abandoned this "no independent business purpose" rule and held that a minority shareholder could obtain equitable relief against a freezeout only upon a showing that the transaction did not meet the test of "entire fairness." "Entire fairness," said the Delaware court, meant both "fair dealing" and "fair price," *id.* at 711; for this reason, equitable relief might be appropriate not only in cases of actual fraud, but also where the majority had engaged in "misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching," *id.* at 714. It is this broad "fairness" exception to the exclusivity of the statutory appraisal remedy, rather than the narrow "actual fraud" exception recognized by the Maryland Court of Appeals in *Homer*, that the plaintiffs urge us to apply in juding the sufficiency of their complaint.

We decline to do so. Three years after *Weinberger*, the Maryland Court of Appeals was asked to adopt its "fairness" approach to minority freezeouts in an appeal from the grant of a preliminary injunction against such a merger. *See Lerner*, 511 A.2d at 511.[4] It specifically

[4] While the court was asked to do so by a majority shareholder who sought to avoid the business purpose doctrine, the court's discussion made clear that it was considering all aspects of the *Weinberger* rule. *See* 511 A.2d at 511.

declined to decide whether to do so, saying that such a decision involved "serious, substantial, difficult and doubtful" issues that would require "more deliberate investigation." *Id.* At the same time, the Court of Appeals specifically reaffirmed *Homer's* holding that equitable relief was not available to a minority shareholder when careful analysis of his complaint revealed it to be nothing more than a complaint about the adequacy of the price offered for his shares. *Id.* at 506. Because the *Weinberger* issue was presented to the Maryland court in the preliminary injunction context, its refusal to adopt that doctrine cannot be taken as an affirmative indication that it would not do so, upon further reflection. Absent more authoritative guidance from the state's highest court, however, it is not for this court, sitting in diversity, to extend state law in the manner suggested. Accordingly, it is *Homer's* actual fraud rule, rather than the *Weinberger* "general fairness" test, that we apply in judging the sufficiency of this complaint.

Viewing the plaintiffs' attempted allegations of "fraud" with the suspicion mandated by *Homer*, and under the stringent pleading requirement of Fed. R. Civ. P. 9(b), we are convinced, as was the district court, that they are not sufficient to state a claim for equitable relief under existing Maryland law. Paragraphs 55-70 contain various complaints about income and asset valuations and methods of accounting, which are, as indicated earlier, insufficient to warrant equitable relief under *Homer*. Paragraph 71 alleges that the defendants "concealed from the investing public material

information concerning B&O in order to manipulate and control the price ... of the B&O common stock." Specifically, paragraph 71a alleges that the defendants failed to disclose B&O's plans to sell one or more of its short-line railroads; paragraph 71b that they failed to disclose B&O's projections of income for 1986 and 1987, and that they waited until March of 1987 to disclose B&O's 1986 earnings, though the information was available in January. None of these allegations is sufficient to plead a case of fraud under Maryland law and Fed. R. Civ. P. 9(b), for all of this information was fully disclosed to the B&O shareholders in the notice of merger, and there are no specific facts alleged that show the failure to disclose it earlier affected the market price of B&O's stock or otherwise caused the plaintiffs injury.[5]

Paragraph 72 alleges that the defendants concealed until the merger was announced that Morgan Stanley, which CSX retained as an "independent financial advisor" to provide the appraisals of B&O's common stock used to calculate the cash-out price, had had previous business dealings with CSX, including underwriting CSX offerings and maintaining a trading position in CSX stock. But there is no specific allegation that these prior business dealings prevented Morgan Stanley from exercising independent business judgment in this case, and it is, in any event, undisputed that the prior dealings were fully disclosed to the minority

[5] The plaintiffs' conclusory allegations that the information concealed was relevant to the market's valuation of the B&O stock, see ¶71a, is insufficient to plead fraud under Rule 9(b).

shareholders in the notice of merger. These conclusory allegations of bias are simply insufficient to make out the concrete case of fraud required by *Homer*.

In sum, we think a fair reading of the complaint as a whole reveals the plaintiffs' fundamental grievance to be one of inadequate price, rather than fraudulent dealing. Because the statutory appraisal remedy provides a wholly adequate—and in these circumstances exclusive—remedy for price inadequacy, we agree with the district court that the third count of the complaint fails to state a claim upon which relief can be granted. We are bolstered in this conclusion by a recent decision of the Maryland Court of Special Appeals in the parallel state court litigation challenging this same merger. *See Walter J. Schloss Assoc. v. The Chesapeake & Ohio Ry.*, No. 710, Sept. Term 1977 (Md. Ct. Spec. App. Jan. 20, 1987). The plaintiffs in *Schloss* are represented by the same counsel as the plaintiffs in this case, and the allegations in their complaint are in all material respects the same as those in the complaint now before us.[*] The Maryland court found these allegations insufficient to state a claim for equitable relief under *Homer*, and we think the same analysis applies here.

IV

For the foregoing reasons, the judgment of dismissal is affirmed.

AFFIRMED.

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[*] We have considered carefully the differences between the two complaints pointed out by the plaintiffs and find them to be inconsequential.

Appendix C—Opinion of the United States Court of Appeals for the Fourth Circuit (1988).

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of September, 1988, a true and correct copy of the foregoing Petition for Certiorari was served by United States first-class mail, postage prepaid, addressed to:

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MICHAEL P. MALAKOFF

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-558 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MARGARETHA WALK, an individual, and MAURICE WALK, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust and VINCENT CIARLANTE,
Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY and CSX CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the "pattern of racketeering activity" requirement of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68 ("RICO") is met where the alleged predicate acts consisted only of disconnected and ordinary corporate transactions.

II. Whether the Fourth Circuit, in upholding the District Court's dismissal of RICO claims, and in determining whether a sufficient "pattern of racketeering activity" was alleged, properly considered whether certain corporate transactions, alleged by Petitioners as the requisite RICO criminal conduct, demonstrated a continuity of criminal activity.

PARTIES

The caption of the case in this Court contains the names of all parties presently before the Court. The proper names of the Respondents in this proceeding are as listed in the caption of Respondents' Brief. These parties are the same parties to the proceedings below.

The Baltimore and Ohio Railroad Company ("B&O") was merged into The Chesapeake and Ohio Railway Company ("C&O") on April 30, 1987. C&O was merged into CSX Transportation, Inc. in September 1987. Excluding wholly owned subsidiaries, the corporate subsidiaries and affiliates of CSX Corporation ("CSX") are:

Allegheny and Western Railway Company;
The Baltimore and Cumberland Valley Rail Road Extension Company;
The Baltimore and Philadelphia Railroad Company;
The Central Railroad Company of South Carolina;
Clearfield and Mahoning Railway Company;
The Cleveland Terminal and Valley Railroad Company;
Dayton and Michigan Railroad Company;
Dayton and Union Railroad Company;
The Home Avenue Railroad Company;
Mid Allegheny Corporation;
Richmond, Fredericksburg and Potomac Railroad Company;
Akron Union Passenger Depot Company;
August and Summerville Railroad Company;
Beaver Street Tower Company;
Central Transfer Railway and Storage Company;
Chatham Terminal Company;
CSX Services, Inc.;
The Lakefront Dock and Railroad Terminal Company;
North Charleston Terminal Company;
Winston-Salem Southbound Railway Company;
Woodstock & Blocton Railway Company;
Yukon Pacific Corporation; and
Staten Island—Cranford, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-558

MARGARETHA WALK, an individual, and MAURICE WALK, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust and VINCENT CIARLANTE,

Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY and CSX CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company and CSX Corporation, respectfully request that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 847 F.2d 1100 and is reproduced in the Petitioners' Appendix commencing at Page A3. The decision of the United States District

Court for the District of Maryland is reported at 659 F. Supp. 824 and is reproduced in the Petitioners' Appendix commencing at Page A10. References to the opinions below shall be to the appropriate page of the Petitioners' Appendix and designated as "Pet. App. ——."

JURISDICTION

The judgment of the United States District Court for the District of Maryland was entered on May 6, 1987, dismissing, under Federal Rule of Civil Procedure 12(b)(6), Petitioners' RICO complaint. The United States Court of Appeals for the Fourth Circuit upheld the District Court's dismissal in an opinion dated May 31, 1988. A request for rehearing *en banc* was denied on June 30, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Facts Alleged

The facts, as alleged by Petitioners in the complaint, and taken as true by the United States Court of Appeals for the Fourth Circuit for the purpose of its decision, Pet. App. A11, are as follows.[1]

As of 1986, The Baltimore and Ohio Railroad Company ("B&O"), a Maryland railroad incorporated in 1827, was owned by The Chesapeake and Ohio Railway Company ("C&O"), a Virginia corporation, and other stockholders. C&O, a wholly owned subsidiary of CSX Corporation ("CSX"), owned at that time more than 90% of B&O's stock. App. 30a, 35a.

On December 2, 1986, the B&O Board of Directors approved the merger of B&O into C&O. App. 30a. That

[1] Respondents dispute many of the facts alleged by Petitioners. The facts are set forth as alleged solely because of the procedural posture of this case under Rule 12(b)(6).

merger was one step in a plan by CSX, announced in December of 1985, to restructure its major business segments and consolidate its transportation companies into one overall business group known as CSX Transportation in order to streamline operations and to promote overall efficiency. App. 39a. At that time, CSX owned C&O, which controlled B&O. CSX also owned Seaboard System Railroad, Inc. (subsequently renamed CSX Transportation, Inc.); Richmond, Fredericksburg and Potomac Railroad Company; American Commercial Lines, a company which engages in barging and other water related business; Sealand Corporation, a company which primarily engages in ocean container transportation; and Chessie Motor Express, Inc., a trucking company. App. 39a.

Because B&O and the other transportation companies were separate corporate entities, separate books and records were maintained for each company thereby creating unnecessary and expensive administrative burdens. For example, transactions between B&O and its affiliates had to be structured as arm's length transactions resulting in complex accounting entries and thus requiring substantial administrative effort and expense. It was thus becoming increasingly uneconomical for CSX to maintain all of the transportation companies as separate corporate entities. App. 40a.

Because the B&O Board of Directors realized the economic impracticality of maintaining B&O and C&O as separate corporations, the B&O board unanimously authorized and approved the merger of B&O into C&O. Since C&O owned more than 90% of B&O's outstanding common stock, the merger was effected without shareholder approval pursuant to Maryland's statutory short form merger law codified in § 3-106 of the Corporations and Associations Article of the Annotated Code of Maryland. App. 30a, 35a.

B&O engaged Morgan Stanley and Co., Inc. ("Morgan Stanley"), an investment banking firm which regularly

engages in the valuation of railroads and other businesses, to advise the B&O Board of Directors as to the fair value of the B&O minority shares. App. 44a.

At the December 2, 1986 B&O board meeting, Morgan Stanley delivered its opinion that the fair value of B&O's common shares, as of October 31, 1986, was approximately $300 million, which, assuming full conversion of the then outstanding debentures, equaled approximately $113 per common share. The merger was approved by the B&O board at that meeting and, following the meeting, the board publicly announced through a press release that the price which would be paid to the minority shareholders would be no less than $113 per common share. App. 44a. At that meeting, the B&O directors voted to call all of the outstanding convertible debentures. Debentureholders were given the opportunity to convert their debentures to common stock prior to the redemption of their debentures so that they could receive a price of no less than $113 per share. App. 41a.

On March 10, 1987, the B&O board met to review the fairness of $113 price. At that meeting, Morgan Stanley, pursuant to the request of the B&O board to update its opinion of fair value, delivered its opinion that the fair value of the outstanding B&O common shares as of March 9, 1987 was $330 million. Assuming full conversion of the debentures, the per common share value was approximately $123.71. After consideration of various factors, including Morgan Stanley's updated opinion, the B&O board decided to adopt the plan of merger and to offer $124 per share for the outstanding B&O minority common shares. The merger was effected as of April 30, 1987. App. 42a, 45a.

B. The Litigation

Margaretha Walk and other minority shareholders of B&O (collectively "Walks") filed, on March 2, 1987, a purported class action complaint which attempted to state

RICO and state common law breach of fiduciary duty causes of action against B&O, C&O and CSX in connection with B&O's December 2, 1986 announcement of the merger of B&O into C&O. The complaint alleged a number of purportedly fraudulent activities the purpose of which, according to the Walks, was to "deprive the minority equity holders of B&O of their right to participate in the growth, earnings and appreciation of B&O and its unique and valuable assets." App. 1a. The complaint sought damages and an injunction against the merger.

On May 6, 1987, the District Court dismissed the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure and concluded that the complaint failed not only to allege a sufficient pattern of racketeering activity to maintain a RICO claim, but also failed to state a claim for breach of state law fiduciary duty. The District Court was "convinced beyond a doubt" that the alleged predicate acts, which included "only certain activities pertaining to debenture holders in 1977, already the subject of another lawsuit, and the mailing of a supplemental brief in that lawsuit in 1982 (Amended Complaint ¶¶ 32-36), the mailing of two proxy statements on March 18, 1983 (*Id.*, ¶¶ 40, 46), and the mailing of a press release and notice pertaining to the challenged merger (*Id.*, ¶¶ 58, 61)," did not constitute a legally sufficient "pattern of racketeering activity." Pet. App. A4-5.

The Fourth Circuit upheld the District Court's decision dismissing the complaint and agreed with the District Court that the predicate acts alleged did not demonstrate sufficient continuity to comprise a "pattern of racketeering activity." Pet. App. A22. The petition for hearing *en banc* was denied on June 30, 1988.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S INTERPRETATION OF THE RICO "PATTERN" REQUIREMENT IS NOT IN DIRECT CONFLICT WITH THE INTERPRETATIONS OF OTHER CIRCUITS.

Petitioners contend that their Petition for Writ of Certiorari should be granted to resolve the differing interpretations of the RICO "pattern" requirement by the Courts of Appeals. Their petition should be denied, however, because the Fourth Circuit's interpretation of the RICO "pattern" requirement is not in conflict with the interpretations of the other circuits.

A. The Fourth Circuit Correctly Adopted A "Flexible" Or Case-By-Case Approach In Determining The Existence Of A RICO Pattern.

In *Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985), the Court set forth the necessary elements to establish a cause of action under Section 1962(c) of the RICO statute: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Although the *Sedima* opinion did not define the latter two elements—pattern of racketeering activity —it provided general guidance for their interpretation.

First, the statutory minimum of two predicate acts usually will not be sufficient to establish a RICO pattern. *Id.* at 496, n.14. Second, a RICO pattern requires the threat of continuing racketeering activity. Finally, the existence of a "pattern" depends on various factors including whether the underlying criminal acts "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characterisites and are not isolated events." *Id.* (quoting 18 U.S.C. § 3575[e]).

Thus, the Court has clearly pointed to a factual and contextual analysis of the underlying criminal activity in

determining whether a requisite RICO "pattern" has been alleged. It further has suggested that the lower courts should develop a more meaningful concept of "pattern". *Id.* at 500; Pet. App. A17.

In this case, and in its prior opinions, the Fourth Circuit has followed the guidance provided in *Sedima.* Beginning with *International Data Bank, Ltd. v. Zepkin,* 812 F.2d 149, 155 (4th Cir. 1987), the Fourth Circuit recognized that "no mechanical test can determine the existence of a RICO pattern." *Id.* Rather, "[w]hat constitutes a RICO pattern is thus a matter of criminal dimension and degree." *Id.* The Fourth Circuit in *Zepkin* held that a single scheme with a limited purpose did not comprise a "pattern".

Later, in *HMK Corporation v. Walsey,* 828 F.2d 1071, 1074 (4th Cir. 1987), the Fourth Circuit explained that a RICO pattern "depends on context, particularly on the nature of the underlying offenses . . . because the heightened civil and criminal penalties of RICO are reserved for schemes whose scope and persistence set them above the routine." *Id.* It held that frauds committed for the singular purpose of obtaining favorable land use decisions did not constitute a "pattern". In this fashion, the Fourth Circuit established a "flexible" or case-by-case approach in determining whether a RICO "pattern" existed.

Continuing with its case-by-case approach, the Fourth Circuit in *Walk* observed that "the determination of whether particular predicate acts reflect 'continuous' criminal activity cannot be made in a vacuum, but must take into account the inherent characteristics of the situation in issue." Pet. App. A21. Given the breadth of criminal activity covered by RICO and the limitless possibilities for criminal enterprise, no listing of such characteristics or factors can possibly be prescribed by this Court. Thus, to determine whether a RICO "pattern"

exists, a court must consider not only whether the statutory minimum of two predicate acts has been alleged, but also the broad and variable range of qualitative factors relating to the allegations. One of these factors is the objective of the related predicate acts; if the objective is singular and limited, "continuity", and thus a RICO pattern, are unlikely to be found to exist. Pet. App. A24.

B. The Fourth Circuit's "Flexible" Approach Is Not At Issue In *H.J. Inc. v. Northwestern Bell Telephone Company*, And Denial Of Certiorari Here Need Not Await Disposition Of That Case.

The Fourth Circuit's "flexible" approach has not been rejected or even criticized by the other circuits. Moreover, this "flexible" approach is not a part of the controversy involving the Eighth Circuit's rule that a RICO "pattern" requires the existence of more than one scheme. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (March 21, 1988, No. 87-1252). Likewise, the Fourth Circuit's approach does not embrace the contrasting interpretations of the Second and Eleventh Circuits which focus upon the number of predicate acts, while ignoring the concept of "scheme". *See, e.g., United States v. Ianniello*, 808 F.2d 184, 189-93 (2d Cir. 1986), *cert. denied, Cohen v. United States*, 107 S. Ct. 3229 (1987); *Bank of America Nat'l Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986).

Because the Fourth Circuit does not subscribe to any mechanical tests, its interpretation of RICO "pattern" is not tied to the conflicting positions at issue in *H.J. Inc.* Under appropriate circumstances, the Fourth Circuit could find a RICO "pattern" of racketeering in a minimum number of predicate acts; yet under other circumstances, find no RICO "pattern" in numerous predicate acts and/or schemes. Pet. App. A22-23. Such differing results emerge from the Fourth Circuit's analysis of the factual context of the RICO claims, particularly

the criminal dimension and degree of the underlying offenses. *HMK Corporation*, 828 F.2d at 1073-74; Pet. App. A25. Thus, the Fourth Circuit's approach to the RICO "pattern" requirement differs from those of the Eighth, Second and Eleventh Circuits, but does not stand in direct conflict with those Circuits.

Petitioners urge this Court to grant their Petition for Writ of Certiorari and to stay consideration of their appeal pending the Court's disposition of *H.J. Inc.* Resolution of the questions presented in that case, however, will not control the disposition of the present case. The Eighth Circuit, in *H.J. Inc.* and its predecessors, has fashioned a stringent interpretation of the RICO "pattern" requirement which is inconsistent with the interpretations adopted by most circuits. The requirement of more than one "scheme" has not been followed by the Fourth Circuit. Pet. App. A22-23. Affirmance of the Eighth Circuit's interpretation in *H.J. Inc.* will undercut the basis for the petition in this case, while a reversal is not likely to advance Petitioners' effort to obtain review. This is because the petitioners in *H.J. Inc.* argue for the same "flexible" or case-by-case approach enunciated by the Fourth Circuit in *Walk*:

> [I]t is only through an examination of the total factual context of each case that a finder of fact can determine whether a pattern of racketeering activity exists. The factual context approach for examining whether a pattern exists becomes even more important because the nature of the pattern changes depending upon which subsection of the act is alleged.

Brief of Petitioners at 32-33, *H.J. Inc.*

While the Court's resolution of *H.J. Inc.* is in no sense constrained by the arguments of the parties, the fact that the petitioners in *H.J. Inc.* seek the same legal standard applied by the Fourth Circuit in this case certainly indicates that denial of the present petition need not await the Court's disposition of *H.J. Inc.*

C. There Is No Conflict Between The Fourth Circuit's "Flexible" Approach And The "Factors" Approach Taken By The Third And Seventh Circuits.

Petitioners argue that the Fourth Circuit's refusal to identify specific factors to be considered in determining the existence of a RICO "pattern" places it in conflict with the Third and Seventh Circuits. There is no such conflict, however, because neither the Third nor the Seventh Circuit has adopted fixed or all encompassing criteria for identifying a RICO "pattern". Although both Circuits have enumerated certain relevant factors to be considered in determining the existence of a RICO "pattern", such factors are plainly stated as examples, not hard and fast rules. *Barticheck v. Fidelity Union Bank/First Nat'l State*, 832 F.2d 36, 39 (3d Cir. 1987) ("combination of specific factors such as . . . ."); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) ("relevant factors include . . . .").

Rather than conflicting with the "flexible" or case-by-case approach adopted by the Fourth Circuit, the interpretations of the RICO "pattern" requirement by the Third and Seventh Circuits are, in fact, fully consistent with that of the Fourth Circuit. In *Morgan*, the Seventh Circuit observed that "[t]he doctrinal requirement of a pattern of racketeering activity is a standard, not a rule, and as such its determination depends on the facts and circumstances of the particular case." *Morgan*, 804 F.2d at 976. Likewise, in *Barticheck*, the Third Circuit refused to adopt a precise formula for determining when a RICO "pattern" exists, concluding that such determination depends upon "the circumstances of the particular case." *Barticheck*, 832 F.2d at 40. Consequently, Petitioners' contention that there is a conflict between the Fourth Circuit and the Third and Seventh Circuits must be rejected.

The Walks also contend that their RICO claims would not have been dismissed under the interpretations of

"pattern of racketeering" articulated by the Third and Seventh Circuits. Their argument rests entirely upon speculation that the Third or Seventh Circuit would view the facts and circumstances of their claims more favorably and reach a different conclusion. The Fourth Circuit reviewed Petitioners' RICO claims in their proper context, taking "into account the inherent characteristics of the situation in issue." Pet. App. A21. As described by the District Court, the criminal conduct underlying the Petitioners' RICO complaint consisted of:

> certain activities pertaining to debenture holders in 1977, already the subject of another lawsuit, and the mailing [to a Federal Court] of a supplemental brief in that lawsuit in 1982, the mailing of two proxy statements on March 18, 1983, and the mailing of a press release and notice pertaining to the challenged merger.

Pet. App. A5.

In affirming the District Court's dismissal of the Walks' RICO claims, a unanimous Fourth Circuit panel found that:

> the number of predicate acts and the length of time over which they occurred are more a reflection of the peculiar context in which the activity occurred —a lengthy and bitter battle for control of a large corporate entity—than of ongoing criminal conduct whose scope and persistence poses a special threat to social well-being.

Pet. App. A22.

Thus, there is no basis for the Walks' argument that their RICO claims would have survived scrutiny by the Third and Seventh Circuits.

Petitioners' broad contention that RICO claims have been sustained by other courts based upon fewer predicate acts, fewer victims, injuries, and perpetrators and, in general, "lesser" allegations of racketeering than al-

leged in the *Walk* complaint is inapposite. Satisfying the RICO "pattern" requirement is not simply a matter of counting up predicate acts, victims, injuries, perpetrators or other matters related to alleged criminal conduct. Since illegal conduct arises in ever-changing contexts and circumstances, it is extremely difficult, if not impossible, to draw useful, summary comparisons between criminal activities described in different cases. As a result, Petitioners' contention that fewer or "lesser" allegations of racketeering activity have been sustained by other circuits is of little, if any, significance.

For the reasons set forth above, the Fourth Circuit's interpretation of the RICO "pattern" requirement does not directly conflict with the interpretations by the other circuits. Therefore, the Walks' Petition for Writ of Certiorari should be denied.

II. THE FOURTH CIRCUIT HAS NOT DISTINGUISHED OR REJECTED RICO CLAIMS BASED UPON WHETHER SUCH ACTIVITIES POSE A SPECIAL THREAT TO SOCIAL WELL-BEING.

The Walks argue that their petition should be granted because the Fourth Circuit applied an unconstitutionally vague standard in *Walk* to distinguish among the various categories of criminal conduct falling within the purview of the RICO statute. They suggest that the Fourth Circuit has decided that only criminal activities which "pose a special threat to social well-being" can pass muster under RICO and that white-collar crimes such as mail and securities fraud do not pose such a "special threat". The Fourth Circuit has made no such distinction.

Contrary to Petitioners' assertion, the Fourth Circuit has not employed its "special threat" analysis to create distinctions among the crimes enumerated by Congress in 18 U.S.C. § 1961(1). Rather, the "special threat" analysis has been used solely to determine whether suffi-

cient "continuity" has been alleged to comprise a "pattern". Where, as here, a single purpose scheme is alleged which is limited in scope to a single discrete objective, no special threat to social well-being and, hence, no "continuity" or "pattern" exists. Pet. App. A23. The Fourth Circuit has not created a "special threat" criterion to distinguish between the Walks' allegations and "more serious criminal schemes." The court clearly stated that it will conclude that RICO violations have been alleged in the corporate setting if they are properly set forth:

> We do not, of course, mean to suggest that a single ongoing scheme of racketeering activity can never constitute a pattern when it occurs in the corporate context. Indeed, one of the most obvious examples of a RICO pattern—a scheme that involves setting up a series of shell corporations, selling stock in them by means of various false representations, and then disappearing with the proceeds—occurs in the corporate context.

Pet. App. A23.

The Walks' RICO claims were rejected because they failed to demonstrate sufficient continuity to establish a RICO pattern. Pet. App. A23. Examining the factual context of the Walks' RICO claims, the Fourth Circuit concluded that a "pattern" within the meaning of the RICO statute was not alleged. Developing a meaningful concept of "pattern" necessary to prevent extraordinary and unintended uses of RICO,[2] the Fourth Circuit stated that the objective of the related predicate acts is a factor that it will consider in determining whether "continuity" exists. Pet. App. A24.

Petitioners' argument that the Fourth Circuit's analysis of the "pattern" requirement creates an unconstitutionally vague standard is meritless. The Fourth Circuit has simply developed a framework for analyzing the facts

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[2] *See Sedima*, 473 U.S. at 500; Pet. App. A17.

and circumstances alleged in a RICO case to determine, on a case-by-case basis, whether a pattern of racketeering activity exists. Its approach is similar to those of the Third and Seventh Circuits. The case-by-case analysis is identical to that employed by the courts in determining liability under the Sherman Act, and no constitutional infirmity exists. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, 1519 (1988); *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438-39 (1978); *Nash v. United States*, 229 U.S. 373, 376-77 (1911) (Sherman Act is constitutional and may be enforced even though, under the Act, the fate of a criminal defendant may depend "on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.")

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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October 26, 1988

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. S-87-488

MARGARETHA WALK, an individual, and MAURICE WALK, Trustees for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust, and VINCENT CIARLANTE, *Plaintiffs*,

vs.

THE BALTIMORE AND OHIO RAILROAD, CHESAPEAKE AND OHIO RAILROAD, and THE CSX CORPORATION, *Defendants.*

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a class action brought by the Representative Plaintiffs, who are all minority shareholders of The Baltimore & Ohio Railroad ["B&O"], a railroad organized and existing under the laws of Maryland, which is 98.5% owned by the Chesapeake & Ohio Railroad ["C&O"], which in turn is a 100% owned subsidiary of CSX Corporation ["CSX"]. For more than ten years the Defendants have engaged through a series of complex corporate transactions in fraudulent schemes designed to deprive the minority equity holders of B&O of their right to participate in the growth, earnings and appreciation of B&O and its unique and valuable assets. This Amended Complaint seeks relief to protect the remaining minority shareholders of B&O from the Defendants' attempted

final act against them, which is to totally exclude the minority shareholders from any participation in B&O through a short form cash out merger tainted with fraud, self-dealing and overreaching.

II. JURISDICTION

2. The claims asserted in the First and Second Counts arise under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Sec. 1962(a) and (c). This Court has jurisdiction over said claims without regard to the amount in controversy or diversity of citizenship of the parties, under the provisions of 18 U.S.C. Sec. 1964(a).

3. The claims asserted in the Third Count arise under the provisions of 28 U.S.C. Sec. 1332. Plaintiffs' damages exceed ten ($10,000) dollars, exclusive of interest and costs. There is diversity of citizenship of the representative Plaintiffs and the Defendants.

4. The claims asserted in the Third Count also arise under the pendent jurisdiction of this Honorable Court.

III. THE PARTIES

5. Plaintiff, Margaretha Walk, is an individual who is a Teton Village, Wyoming resident. Plaintiff, Maurice Walk, as Trustee for the Cynthia Walk Trust, the Dinand M. Walk Trust, and the Margaretha Walk Trust, is an Illinois resident. The Walks are owners of 4740 shares of B&O common stock. As shareholders the Walks have the statutory right to inspect the books of the Defendant B&O.

6. Plaintiff, Vincent Ciarlante, is a North Carolina resident and is the custodian for Beth Ann Ciarlante and Deanna L. Ciarlante. Individually and/or as custodian he owns over 500 shares of B&O common stock. As a custodian of a shareholder Ciarlante has the statutory right to inspect the books of the Defendant B&O.

7. Defendant, B&O, is a railroad organized and existing under the laws of the state of Maryland, with its principal offices located in Baltimore, Maryland. B&O has approximately 2,670,000 shares of common stock outstanding. B&O's common stock is traded in the over-the counter-market; B&O's convertible debentures, which have now been called for redemption and which can be converted into B&O common stock were traded on the New York Stock Exchange.

8. Defendant, C&O, is a Virginia corporation, which owns approximately 98.5% of B&O's outstanding shares of common and preferred stock. C&O is a 100% owned subsidiary of CSX Corporaiton ("CSX"), a Virginia corporation.

9. Defendant, CSX, is a Virgina corporation, with principal offices in Richmond, Virginia. CSX, by virtue of its 100% ownership of C&O, dominates and controls both C&O and B&O. All of the directors and officers of C&O and B&O are employees and/or officers of CSX or one of its subsidiaries.

IV. CLASS ACTION ALLEGATIONS

10. This is a Plaintiff class action brought pursuant to Fed. R. Civ. P. Rule 23(b)(2) and 23(b)(3) on behalf of all of the persons who were owners of the common stock of B&O as of December 1, 1986 (excluding the corporate Defendants, entities affiliated with them and all officers and directors of B&O, C&O and CSX and members of their immediate families) who are being forced to surrender their B&O stock in a self-dealing freeze-out merger of B&O into its parent C&O.

11. The class of B&O common stockholders, on behalf of whom this action is brought, is so numerous that joinder of all class members is impracticable. There were as of December 1, 1986 more than 400 beneficial owners of the minority stock interest in B&O common stock not

owned by C&O. The number and identity of the members of the Class are determinable from the records of B&O or its agent. Members of the class are distributed throughout the United States. In many instances the Class members may be unaware that claims on their behalf exist, or are unaware of the facts giving rise to such claims. As shareholders the representative and class Plaintiffs have the statutory right to inspect the books of the Defendant B&O.

12. Because of the nature of the claims, there is a substantial risk of inconconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Defendants. Moreover, as a practical matter, an adjudication of the interests of the Representative Plaintiffs could be dispositive of the interests of the Class members because their claims are identical in many if not all material respects.

13. Common questions of law and fact affect the rights of each member of the Class and common remedies by way of an injunction or damages for the Plaintiff Class are requested.

14. Common questions of fact predominate and include the following:

A. Whether Defendants developed a scheme or series of schemes for excluding the minority holders of B&O from participation in the growth and appreciation of B&O and its assets in order to benefit Defendants at the expense of B&O's minority shareholders;

B. Whether Defendants made material misrepresentations and omissions in the documents which they publicly disseminated through filings with the SEC and through the United States mail in order to conceal from B&O and its minority holders and the minority holders of other CSX

subsidiaries the fact that transactions involving B&O and its assets and other affiliates of CSX were being taken to advantage Defendants C&O and CSX at the expense and to exclusion of the minority holders; and

C. Whether Defendants, by dominating the Boards of Directors of B&O, MAC and other CSX subsidiaries, caused those corporations and their Boards to vote their approval and vote their shares of stock in favor of transactions involving B&O and other CSX subsidiaries with minority holders to advantage Defendants C&O and CSX at the expense and to the exclusion of B&O and its minority shareholders and the minority shareholders of other CSX subsidiaries.

15. Common questions of law predominate and include the following:

A. Whether Defendants' misrepresentations and omissions which they made in filings with the SEC and other materials sent through the United States mail were fraudulent within the meaning of 18 U.S.C. Sec. 1341;

B. Whether Defendants breached the fiduciary duties which they owed to the minority holders of B&O under state law;

C. Whether Defendants' breach of the fiduciary dutise which they owed to the minority shareholders of B&O were taken pursuant to a fraudulent scheme or series of schemes to deprive B&O and other CSX subsidiary minority holders of their right to participate in the growth and appreciation of B&O or the other CSX subsidiaries in violation of 18 U.S.C. Sec. 1962(c).

D. Whether the Plaintiffs were injured by the Defendants' fraudulent scheme or series of schemes

consisting of "racketeering activities" within the meaning of 18 U.S.C. Sec. 1961(1), incorporating 18 U.S.C. Sec. 1341 pertaining to mail fraud; and

E. Whether Plaintiffs are entitled to damages re-resulting from the proposed merger of B&O into C&O so as to exclude any further participation by the B&O minority shareholders in the growth and appreciation of B&O.

16. Representative Plaintiffs will assure the adequate representation of all members of the Class and they can and do undertake to honorably represent the Class. Counsel retained by Plaintiffs have substantial experience in class actions. The Representative Plaintiffs have no interests which are adverse to the Class.

17. A class action is superior to other available methods for the fair and efficient adjudication of this controversy against the Defendants.

V. FIRST COUNT: AGAINST DEFENDANTS C&O AND CSX UNDER SEC. 1964(c) OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

18. The averments of Paragraphs 1 through 17 of this Amended Complaint are incorporated by reference.

19. B&O was incorporated in the State of Maryland in 1827. It operates an extensive rail system in eleven states and the District of Columbia. Its principal lines extend through Baltimore and Washington, D.C. to Cumberland, Maryland, and from Cumberland by separate routes to Chicago and St. Louis.

20. B&O, MAC, WMR and WMC are each enterprises engaged in and whose activities affect interstate commerce. CSX and its affiliated subsidiaries including C&O, B&O, MAC, WMR, and WMC also constitute an enter-

prise engaged in and whose articles affect interstate commerce. At all relevant times, Defendants, C&O and CSX and its predecessor Chessie Systems, Inc., were associated with B&O and WMR, and dominated and controlled the operations and financial affairs of B&O and WMR. At all relevant times, Defendant CSX was associated with, and dominated and controlled the operations and financial affairs of MAC and WMC as well as the activities of the CSX' affiliated subsidiaries.

21. In 1961, C&O acquired 99.63% of the common stock of B&O, at which time trading in B&O common stock ceased and the common stock was delisted, even though there remained 13 outside common shareholders.

22. In 1963, C&O received ICC permission to control the B&O. In 1980 Chessie was merged into CSX.

A. The B&O Dividend Policy and the Purchase of the Convertible Debentures for Less Than Their Face Value

23. Beginning in 1961, and continuing until 1978, B&O paid no cash dividends on its common stock, even though B&O had a strong net earnings record.

24. As of March 3, 1975, B&O had outstanding $31,996,000 principal amount of convertible 4½% Debentures, Series A, due 1/1/2010 ["Debentures"]. Those debentures were convertible into B&O common stock, but there was no incentive for Debentureholders to convert their Debentures, in light of the no-dividend policy of the B&O.

25. The Convertible Debentures could be called for redemption at $1,050. However, on March 3, 1975, B&O invited tenders of the Debentures at $550 for each $1,000 principal amount, plus accrued interest, as a result of which B&O purchased $11.6 million face amount of the Debentures at a gain to B&O of $5.2 million, before taxes.

26. In 1976, B&O purchased more than $7 million face amount of the Debentures at an average price of approximately $574 per $1,000 Debenture.

27. From January 1974 until December, 1977, B&O purchased, in the open market or by tender offer, $19,471,000 principal amount of the Debentures, all at prices substantially below their face value.

28. From January 1, 1973 through December 31, 1977, B&O's net income as reported on an equity accounting basis to the ICC was $218,373,000. That income was reported in the net income of C&O, so that C&O, unlike any minority shareholders of B&O had the benefit of B&O's earnings.

29. By failing to pay any dividends on its common stock despite its substantial earnings, Defendant C&O was able to coerce large numbers of B&O's Debentureholders to sell their Debentures to B&O at less than face value, to the benefit of C&O, B&O's majority controlling shareholder, thereby increasing C&O's equity interest in B&O at the expense of the selling Debentureholders.

30. Unable to purchase all of the minority owned B&O debentures at less than their fair value, Defendants developed another scheme to exclude the B&O minority interests from participation in B&O's valuable assets and growth as set forth below.

B. The Transfer of B&O's Non-Rail Assets to MAC to Avoid Participation in Those Assets by B&O's Convertible Debentureholders

31. Besides its significant railroad assets, in the 150 years following its incorporation, B&O accumulated real estate properties in prime locations particularly along the East Coast of the United States, and other very substantial non-rail assets.

32. On December 13, 1977, Defendant C&O and the Chessie System (predecessor to CSX) caused B&O to

transfer virtually all of its non-rail assets available for development, to its subsidiary, the Mid Allegheny Corporation ["MAC"], and on that same date to declare a dividend-in-kind of the MAC stock to B&O common stockholders of record on that same date (i.e., C&O and 13 outside shareholders), thereby removing the non-rail assets from the reach of the Debentureholders' conversion privilege, to the benefit of Defendant C&O and at the expense of the Debentureholders. That transaction was found by the Court of Appeals for the Third Circuit to be a "manipulative or deceptive device or contrivance in violation of section 10(b)" of the Securities Exchange Act. *Pittsburgh Terminal Corp. v. Baltimore & Ohio R. Co.*, 680 F.2d 933, 943 (1982), *cert. denied*, 459 U.S. 1056 (1982) ["*PTC*"]. The Representative Plaintiffs all owned B&O debentures on December 13, 1977.

33. In 1987, as a result of the relief awarded in *PTC*, the plainitffs in *PTC* and certain other Debentureholders, upon conversion of their Debentures will receive the opportunity to obtain the MAC common stock, representing an equity interest in the remaining B&O non-rail assets, of which they were deprived back in 1977 by Defendants' fraudulent acts. The Representative Plaintiffs will all own MAC stock as a result of the relief awarded in *PTC*.

34. The registration statement for the MAC stock finally filed in December 1986 indicates that the former B&O assets now owned by MAC include, *inter alia*, 53 acres in Staten Island, New York; 2 acres along Race Street in Philadelphia, Pennsylvania; 1,738 acres in Marley Neck, Maryland; 160 acres in Baltimore, Maryland; and thousands of acres located in various states in the eastern part of the United States along with millions of tons of demonstarated coal reserves and thousands of acres of mineral lands, showing a shareholders' equity of $52,195,000 or over $20 per share.

35. Although there were approximately $13,202,000 face amount of Debentures outstanding on December 13, 1977, by failing to disclose to the Debentureholders material facts concerning the circumstances surrounding B&O's declaration of the MAC stock dividend, the fact of the *PTC* litigation, the fact that the *PTC* plaintiffs established that the MAC dividend transaction constituted a violation of Sec. 10(b), and other material facts, Defendants engaged in a securities fraud and/or mail fraud within the meaning of 18 U.S.C. Sec. 1961(1) and succeeded in limiting their obligation to distribute the MAC stock representing an equity interest in former B&O nonrail assets to only a small percentage of the former outstanding public minority equity holders of the B&O, despite their fiduciary duties to all those minority holders.

36. Defendants used or caused the use of the mails to misrepresent the scope of the stipulation which they filed in *PTC* so as to deprive B&O minority debentureholders of their opportunity to participate in any relief awarded in that case.

a. By letter dated August 3, 1982, the Clerk of Courts for the Third Circuit Court of Appeals requested that all parties to the appeal at No. 81-1976 entitled *Lucille Lowry and Lowry-Zweig Corp. v. The Baltimore and Ohio Railroad, The Chesapeake and Ohio Railroad Company, and Chessie System, Inc.* file supplemental briefs addressing certain issues including the following:

> "If a different law of assignability applies to causes of actions arising under federal law and state law, what persons will be covered by the stipulation in *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co.* that convertible debenture holders who are not parties will receive any benefits ultimately decided to be due to the individual plaintiffs in that case?"

b. The Supplemental Brief filed by B&O, C&O and Chessie in response to the Court's request, which was sent through the mails to *inter alia* counsel representing a putative class of B&O minority debentureholders, stated:

> "The stipulation in *Pittsburgh Terminal Corp. v. Baltimore and Ohio Railroad Co., et al. at* Nos. 81-1674-1675 relates to the debenture holders who owned their debentures on the day of the declaration of the MAC dividend *whether or not they subsequently sold or converted their debentures.* It was intended to insure that all of those debenture holders would be treated in exactly the same manner as the plaintiffs in those two consolidated actions should they prevail on the merits of their claims. This agreement was made with the trustee under the Indenture, the Chase Manhattan Bank, and was intended to provide full protection for all of the debenture holders, whether or not they were formal parties to those suits." (Emphasis added)

c. In 1984, Defendants argued successfully to the court in *PTC* that they never intended to provide relief pursuant to the above stipulation to B&O debenture holders who sold their debentures held on December 13, 1977. In 1986, Defendants argued successfully to the court in *PTC* that they never intended to provide relief pursuant to the above stipulation to B&O debenture holders who converted their debentures and then sold their B&O common stock received upon conversion.

d. To the extent that Defendants did not intend by their Stipulation in the *PTC* case to protect the interests of debenture holders who subsequently

sold their debentures or converted their debentures and then sold the stock received upon conversion, their representations to the contrary made in their Supplemental Brief were fraudulent and misleading and made pursuant to their scheme to reduce the participation of certain B&O minority holders in their interest in the former B&O assets transferred to MAC on December 13, 1977.

37. As a result of these breaches of duty and fraudulent omissions or misrepresentations Defendants were able to materially reduce the equity position of B&O's minority security holders and increase the equity interest of Defendants C&O and CSX in the valuable non-rail assets of B&O that had been transferred to MAC.

C. The Western Maryland Railway Merger Transaction

38. On February 8, 1983, the B&O Board of Directors, which at that time, as well as now, was identical to the C&O Board of Directors, and was composed exclusively of employees of CSX and its subsidiaries, voted its approval of a merger transaction in which B&O would tender its majority controlling interest in the Western Maryland Railway Company ["WMR"] to C&O at a price of $55 per share representing approximately $70 million to B&O and the minority public shareholders of WMR would be involuntarily eliminated.

39. Although WMR was a major asset of B&O, for which C&O was offering materially less than its book value, B&O's Board approved the transaction after a cursory presentation and discussion, and with no valuation information concerning WMR or B&O's holdings of WMR provided to the directors prior to the vote. While the B&O Directors purported to rely on a fairness opinion issued by the First Boston Corporation "[FBC"] concerning the transaction, no representative of FBC

met with the B&O Board prior to the vote, and the FBC materials were not provided to the Board prior to the vote.

40. On March 18, 1983, Defendants C&O and the CSX caused to be issued and sent through the United States mails a Proxy Statement of WMR which contained numerous material misrepresentations concerning the merger transaction in which C&O intended to and did gain 100% control of WMR including the following:

A. The statement that the Board of Directors of WMR had "carefully considered and unanimously approved the [merger transaction] as being in the best interests of [WMR's] Stockholders" when in fact the consideration given to the transaction was minimal, concerned only with the consequences of the transaction to C&O and CSX and was in violation of the Directors' duty of due care;

B. The statement that the reason for the merger was to provide WMR stockholders with "the opportunity to exchange their shares for a more liquid investment" when the purpose was to obtain 100% control over WMR for Defendants C&O and CSX at the expense of the outside minority stock holders of B&O and WMR;

C. The statement that WMR had engaged an independent investment banking firm, FBC, "for the purpose of assisting the Board of Directors of [WMR] with the possible sale of [WMR] and to evaluate the financial terms of the Merger" when FBC had been retained by Defendant CSX to develop a strategy for acquiring the minority interests in B&O and WMR, had reported to CSX, and had made no presentation, report or evaluation to WMR's Directors on the proposed terms of the merger; and

D. The statement that FBC had "from time to time, advised CSX and its affiliated companies on various financial matters, including issuance of securities, and has received from such companies fees for financial advisory services rendered" when, in fact, FBC had been retained by CSX to develop an acquisition strategy to acquire the minority interests in WMR and interest in B&O, and had then given an opinion to WMR on the price which FBC had developed with CSX as the offering price.

41. A major purpose of the fraudulent material misrepresentations and omissions set forth in the WMR Proxy Statement was to justify B&O's tendering of its majority controlling interest in WMR and to encourage WMR minority shareholders to approve the merger, which was necessary for the implementation of the merger, when the transaction was fraudulently structured to exclude participation by B&O's minority and WMR's minority in WMR and to increase the participation in WMR by Defendants C&O and CSX.

D. The Transfer of MAC's Assets to other CSX Affiliates in Order to Avoid Participation in Those Assets by B&O Minority Holders

42. On May 15, 1978, Defendant CSX caused MAC to consent to the sale to Chessie Resources, Inc., a 100% owned subsidiary of CSX and Western Development Corporation, 116,165 square feet of real property in Washington, D.C. located at 30th and K Street. The sale of the valuable property deprived MAC, and ultimately those with an interest in MAC because of their positions as outside minority holders of B&O, of the opportunity to realize the gain in value of the property through MAC's development of the property, or MAC's sale of the property in an armslength transaction as opposed to an inter-

ested non-negotiated transaction with a wholly owned subsidiary of its dominant controlling shareholder.

43. On December 6, 1979, Defendant CSX caused MAC to consent to the sale of 2.707 acres of real property located in Washington D.C. ["Georgetown Property"] to Georgetown Harbour Associates, and to other commitments in relation to the development of the property in a project involving Chessie Resources, Inc., a 100% owned subsidiary of CSX. The sale and commitments deprived MAC, and ultimately those with an interest in MAC because of their positions as outside minority holders of B&O, of the opportunity to realize the gain in value of the property in an armslength transaction as opposed to an interested non-negotiated transaction involving a wholly owned subsidiary of MAC's dominant controlling shareholder.

44. On or about February 9, 1983, Defendant CSX caused MAC to approve a transaction in which MAC would tender its majority controlling interest in the Western Maryland Company ["WMC"] to CSX Minerals, Inc. ["CSXM"], a 100% owned subsidiary of CSX at a price of $33 per share representing approximately $38 million to MAC.

45. MAC's Board of Directors, all of whom were employees of CSX or its affiliated companies, did not even meet and discuss the above transactions, or to review any documents in connection with the transactions. MAC's proxy was simply voted in favor of the transaction at the WMC shareholders' meeting held on April 14, 1983.

46. On March 18, 1983, Defendant CSX caused to be issued and sent through the United States mails a Proxy Statement of WMC which contained numerous material misrepresentations concerning the merger transaction in which CSX intended to and did gain 100% control of WMC and its assets including the following:

A. The statement that the Board of Directors of WMC had "carefully considered and unanimously approved the [merger transaction] as being in the best interests of [WMC's] Stockholders" when in fact the Board of WMC never met to consider the transaction, did not review any documents prior to voting MAC's shares of the transaction, and failed to consider the financial consequences of the transaction to MAC or any of the B&O minority holders who were to subsequently obtain an equity interest in MAC or to WMC's minority shareholders in violation of the Directors' duty of due care, and CSX's duties as majority controlling shareholder;

B. The statement that the "principal purpose of the Merger [was] to achieve operational efficienies resulting from the consolidation of [WMC] and CSXM operations" when WMC had no employees, but consisted of only assets already managed by other CSX affiliates and the purpose of the merger was solely for CSX to obtain 100% control over those assets at a grossly undervalued price at the expense of the outside minority holders of WMC and MAC;

C. The statement that WMC had engaged an independent investment banking firm, FBC, "for the purpose of assisting the Board of Directors of [WMC] with the possible sale of [WMC] and to evaluate the financial terms of the Merger" when FBC had been retained by Defendant CSX to develop a strategy for acquiring the minority interests in B&O and WMC, had reported to CSX, and had made no presentation, report or evaluation to WMC's Directors on the proposed terms of the merger; and

D. The statement that FBC had "from time to time, advised CSX and its affiliated companies on various financial matters, including issuance

of securities, and has received from such companies fees for financial advisory services rendered" when, in fact, FBC had been retained by CSX to develop an acquisition strategy for the minority interests in WMC and B&O, and had then given an opinion to WMC on the price which FBC had developed with CSX as the offering price.

47. Defendant CSX had the voting power to effectuate the WMC merger, through its control of MAC whether or not the minority shareholders of WMC voted in favor of the merger transaction.

48. A major purpose of the fraudulent material misrepresentations and omissions set forth in the WMC Proxy Statement was to justify MAC's tender of its majority controlling interest in WMC and to create the impression that the transaction was advantageous to MAC when in fact it was fraudulently structured to exclude participation by the present or future (by virtue of the *PTC* litigation) minority equity holders of MAC in a very substantial asset of MAC to the sole benefit of Defendant CSX. In addition, the transaction constituted a fraud on the outside public minority shareholders of WMC.

E. The Imposing of Excessive and Improper Costs on the B&O

49. Plaintiffs believe and, therefore, aver that at least until legal action has been threatened or initiated by outside minority shareholders, Defendants C&O and CSX through their domination and control of B&O, have had the power which they have exercised to burden B&O through intercorporate transactions which benefitted C&O and CSX at the expense of B&O and its outside minority holders.

50. For example, B&O was involved in certain civil and criminal litigation filed against B&O and Defendant

C&O and others charging them with violating the federal anti-trust laws. See, e.g., Civil actions were filed by the Penny Dock and Transport Company, at Civil Action No. 80-1733 (N.D. Ohio), and Litton Industries, Inc., *et al.*, at Civil Action No. 81-372 (N.D. Ohio). A criminal indictment was filed by the United States at Criminal Act. No. 810-00396 (D.D.C.) which concluded with B&O and Defendant C&O pleading *nolo contendere* and paying a substantial fine.

51. In connection with the legal actions described above, Defendants C&O and CSX incurred substantial costs, expenses and attorneys' fees, amounting in excess of $3,200,000, a major portion of which were borne by B&O, even though at all times relevant to the alleged anti-trust violations, Defendant C&O controlled and dominated B&O.

52. It was only after a minority shareholder demanded by letter dated November 14, 1983 that B&O recover from C&O, its parent, certain of the costs, expenses and attorneys' fees incurred in the anti-trust actions, that B&O sought a reallocation of the costs and recovered more than $1,200,000 from C&O in 1984, and a commitment thereafter to equally share the legal costs, expenses and attoreys' fees in the referenced anti-trust actions.

53. Because of their domination and control of B&O, and by reason of C&O's consolidation of B&O's earnings into its own, it is believed and therefore averred that Defendants are able to and have depressed B&O's earning thereby benefitting Defendants C&O and CSX at the expense of B&O's outside minority interests.

54. In 1985, Defendants caused B&O to take a special charge against earnings and other accounts. As a result of the special charge, B&O's earnings were reported at a $21.00 per share loss, even though B&O's earnings without the special charge represented $38.25 per share.

A. The special charge was described as intended to increase future productivity, but the minority shareholders are being merged out of B&O before the benefits of the future productivity are realized; and

B. The December 1985 special charge included $73.3 million for separation pay liabilities for employees who leave the company, including a 1500 position reduction to be completed by 1988, i.e., after the minority shareholders' interests in B&O are merged out of existence.

F. The Proposed Freeze Out Merger of the Remaining B&O Shareholder

55. B&O and Defendants C&O and CSX are proceeding to implement a merger of B&O into C&O, which represents a breach of fiduciary duty and involves fraudulent misrepresentations and omissions in the information publicly disseminated through use of the wires and the mails.

56. According to B&O's 1986 Annual Report, B&O's shareholder equity represented $937 million in 1985 and $943 million in 1986. B&O's operating revenues in 1985 amounted to $1,064,375,000 and in 1986 amounted to $986,335,000.

57. However, on December 2, 1986, the Board of Directors of B&O, all of whom are Directors of C&O, and employees of CSX or its subsidiaries, announced that they had voted to approve a merger of B&O into C&O in a merger which would eliminate the B&O minority shareholders based on a value for B&O of less than $300 million or not less than $113 per share ["B&O Merger"].

58. Defendant CSX announced the freeze out B&O merger in a press release which was sent through the mails and sent over the wires which stated:

RICHMOND, VA—December 2, 1986—Directors of The Chesapeake and Ohio Railroad Company (C&O) today approved a plan of merger under which the B&O will be merged into the C&O. The price to be paid minority shareholders for their B&O common stock was set at $113 per share. While no change in price is anticipated, as required by Maryland law, B&O shareholders will be noticed of the final price of the stock at least within 30 days prior to the merger, but the price will not be less than $113 per share.

The B&O directors also approved a call for redemption of B&O convertible debentures prior to the merger in early 1987. Holders of convertible will have the right to convert each debenture into 10 shares of B&O common stock 15 days prior to the redemption date. The redemption price for the debentures is $1,015.

The merger is expected to be completed in early 1987."

59. The press did not disclose but Defendants subsequently did disclose that the $113 per share price was based on a valuation of the shares of B&O by Morgan Stanley as of October 31, 1986. According to a news article, Morgan Stanley purchased shares of B&O at above $113 per share on December 15, 1986.

60. After this action was filed Defendants increased the purchase price of the B&O stock as evidenced by a March 10, 1987 press release in which Defendants announced the final terms of the merger of B&O into C&O which stated:

"Directors of The Chesapeake and Ohio Railway Company (C&O) and of The Baltimore and Ohio Railroad Company (B&O) today set $124 per share as the price to be paid to minority shareholders for

their B&O common stock. This is pursuant to a previously announced merger under which the B&O will be merged into the C&O. The B&O will mail a Notice of Merger and Information Statement to all shareholders of record as of March 25, 1987. Under applicable state law, no shareholder vote is required for the companies to merge. The merger is expected to be completed during the first half of 1987."

61. On March 27, 1987, Defendants issued to B&O's minority shareholders a Notice Of Approval Of Merger [A copy of the "Merger Notice" is attached hereto as Ex. "A"] notifying them that Defendants intended to implement a merger of B&O into C&O and that the price for the minority shareholders' B&O common stock had been set at $124.[1]

62. The Notice attached a copy of the Merger Agreement approved by the Boards of B&O and Defendants C&O and CSX on December 2, 1986, which established the price of $124 as of December 2, 1986, even though the publicly announced price as of that time was for the B&O's common stock to be purchased by C&O at no less than $113 per share. [Ex. "A", A-2]

63. The Notice states that "it is important to effectuate the Merger as soon as possible" because of the "burden of separate accounting and reporting" arising from a "more costly" "process of allocating revenues and costs." [Notice, p. 3]

64. The Notice attached a copy of the 1986 B&O Annual Report. The 1986 B&O Annual Report for the first time disclosed that as of November 1, 1986, B&O's line haul freight revenues, amounting to 95% of B&O's total operating revenues, ceased to be determined by the actual

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[1] Several of the Representative Plaintiffs did not receive the Merger Notice from Defendants. It is unknown whether Defendants claim that they sent the Merger Notice to all shareholders.

revenues received by B&O, and instead were determined by a formula based on B&O's proportion of CSXT freight revenues by major commodity group in prior years. Thus, Defendants effectively eliminated the separate accounting among the CSX Transportation affiliated companies for B&O's major source of earnings prior to thier announcement of the merger of B&O into C&O.

65. In December 1985 B&O took a special charge of $72.8 million representing a write down of transportation properties to net realizable value. The 1986 B&O Annual Report described the special charge as a "write-down and disposition of marginal and unproductive assets."

66. The Notice, however, advises the shareholders, that no value was attributed by the B&O Board to the book value or liquidation value of B&O in setting the $124 price:

> "The B&O Board considered but assigned no weight to the book value and liquidation value because (i) there are no plans to liquidate portions of material assets of B&O, other than the proposed sale of one short line and other property in the ordinary course of business as disclosed herein and (ii) the assets of B&O, as a whole, are presently not generating sufficient income to pay for replacement costs and the assets are not generaitng a return which would justify a price commensurate to their book value."

67. Even though B&O intends to sell one short line, consisting of 373 route miles [Notice, p. 7], which would constitute a disposition of a very significant asset, and, perhaps, other shore lines [Notice p. 4], apparently the Defendants did not solicit or obtain offers for the short lines, prior to valuing B&O for purposes of the merger.

68. Even though as of the date of the Merger Notice, there was no decision by the United States District Court for the Northern District of Ohio, in a derivative action

filed by a minority shareholder of B&O, asserting breaches of their fiduciary duties to B&O by the Board of Directors of B&O and Defendants C&O and CSX, which had been tried in September 1986, the Defendants attributed no value to the case, made no provision for any benefits to the shareholders if the case resulted in any judgment in favor of B&O, and simply notified shareholders that the case could become moot as a result of the merger [Notice p. 12]. [On March 31, 1987 that case resulted in a defense judgment which is subject to appeal. Nevertheless Defendants have declined to take any actions to preserve the rights of the minority shareholders of B&O in the derivative claim.]

69. B&O's cash flow from operations between 1984 and 1986 enabled it to expend more than $400 million for property additions and betterments, which should enable B&O to earn greatly enhanced operating profits in the future. The $400 million spent on property additions or betterments represents more than the value approved by B&O for its merger with its parent C&O.

70. B&O's operating expenses declined from $1,021,-414,000 in 1984 to $941,526,000 in 1986 or more than 7.8%.

71. Defendants concealed from the investing public material information concerning B&O in order to manipulate and control the price which C&O would pay for the B&O common stock held by the minority shareholders.

a. There was no public disclosure prior to the date on which B&O announced the final merger price for its stock of its intention to sell one or more of its short lines. The December 1, 1986 Morgan Stanley letter states that B&O provided to Morgan Stanley information to it for purposes of valuing B&O as of October 31, 1986 concerning "B&O real estate property scheduled for disposition". Defendants concealed information from the

public, including its minority shareholders, concerning the real estate properties which it had scheduled for disposition, from which the market rather than just Defendants' handpicked investment banker could value B&O and its properties.

b. B&O made no public projections of its income for 1986 and 1987, and failed to report its 1986 earnings until March 27, 1987, even though CSX' 1986 earnings were available in early January. The December 1, 1986 Morgan Stanley letter states that B&O provided to Morgan Stanley "projected income statements for 1986 and 1987". The 1986 B&O Annual Report disclosed that as of November 1, 1986, the great part of B&O's revenues were calculated only as a proportion of CSXT's freight revenues. Defendants therefore concealed information from the public, including its minority shareholders, concerning its income for 1986 and 1987 from which the market rather than just Defendants' handpicked investment banker could assess B&O's value.

72. Until this suit was filed pointing out the failure to so disclose, none of the Defendants or Morgan Stanley disclosed in any of their pre-merger announcements that although Morgan Stanley was retained as "independent financial advisor' 'to B&O Morgan Stanley co-managed a public offering of the securities of CSX, and as of the date of its valuation of the B&O shares maintained a substantial trading position in the securities of Defendant CSX. Morgan Stanley also purchased shares of B&O common stock at a price above $113 per share shortly after the public disclosure of its valuation of the shares at $113.

73. The position taken by Defendants CSX and C&O in the derivative action tried in September, 1986, challenging the WMR merger transaction was that B&O,

even though it was the majority controlling shareholder of WMR, and had a strong business purpose for integrating WMR's operations into its own, could not merge with WMR, because to do so would jeopardize B&O's charter tax exemption in Maryland. Yet in December, 1986, Defendants CSX and C&O caused B&O to approve a merger transaction with C&O in order to eliminate the minority interests in B&O at a grossly inadequate price, even though as a result of the B&O merger B&O will give up B&O's charter exemption in Maryland. Moreover, there is no proper business purpose for this merger transaction. Defendants have at least before June 1982 been attempting to formulate a plan to eliminate the B&O debenture minority at a price advantageous to Defendants' C&O and CSX and disadvantageous to the minority.

74. Defendants' scheme to deprive the minority holders of B&O of their right to participate in the growth and appreciation of B&O involved the use of the mails to send false and fraudulent statements with the intent to conceal the real reasons for Defendants' corporate transactions and to create the impression that the transactions were in the best interests of B&O, MAC, WMR and WMC and the minority shareholders of the CSX subsidiaries, constituted a series of "racketeering activities" as defined in 18 U.S.C. Sec. 1961 of the Racketeering Influenced and Corrupt Organizations Act, incorporating 18 U.S.C. Sec. 1341 pertaining to mail fraud.

75. By virtue of these premises the Representative and Class Plaintiffs are entitled to recover from Defendants C&O and CSX, under RICO, 18 U.S.C. Sec. 1964(c), triple their damages, together with reimbursement of their litigation expenses, including reasonable attorneys' fees.

VI. SECOND COUNT: VIOLATION OF 1962(a)

76. Plaintiffs incorporate by reference Paragraphs 1 through 75.

77. Each of the Defendants, B&O, C&O and CSX received income and other monetary benefits directly or indirectly from the fraudulent schemes constituting the racketeering activities described in this Amended Complaint. Part of that income or the proceeds from that income were used to invest in or acquire additional interests in B&O, MAC, WMR, WMC and/or other CSX affiliates.

78. The Defendants are therefore liable to Plaintiffs pursuant to 18 U.S.C. § 1964(c).

VII. THIRD COUNT: BREACH OF FIDUCIARY DUTY

79. Plaintiffs incorporate by reference Paragraphs through 78 of this Complaint.

80. Defendants C&O and CSX, as the majority controlling shareholders of B&O owed a fiduciary duty to the Plaintiff minority shareholders of B&O which they breached as more fully set forth above. The Representative and Class Plaintiffs are entitled to an injunction restraining Defendants from imposing on B&O and its minority holders the self-dealing merger with C&O, designed to exclude the Plaintiffs from any further participation in B&O's growth and earnings at a grossly inadequate price, together with damages.

VIII. RELIEF

WHEREFORE, the Representative and Class Plaintiffs respectfully request the following relief:

1. First Count (RICO)

   a. Judgment for Plaintiffs and the Class against Defendants C&O and CSX for treble damages;

   b. Costs of this suit;

   c. Reasonable attorneys' fees; and

d. Such other relief as this Court may deem just and proper.

2. Second Count (RICO)

a. Judgment for Plaintiffs and the Class against Defendants B&O, C&O and CSX for triple damages;

b. Costs of this suit;

c. Reasonable attorneys' fees; and

d. Such other relief as this Court may deem just and proper.

3. Third Count (Breach of Fiduciary Duty)

a. Judgment for Plaintiffs and the Class against Defendants C&O and CSX;

b. Injunction restraining Defendants from proceeding with eliminating the minority shareholders of the B&O until:

(1) The issues raised by this Complaint are finally resolved; and

(2) The derivative suit at No. C84-1267 (N.D. Ohio) is finally resolved;

c. Damages;

d. Costs of this suit; and

e. Such other relief as this Court may deem just and proper.

JURY TRIAL REQUESTED.

BERGER KAPETAN MALAKOFF
& MEYERS, P.C.

By /s/ Michael P. Malakoff
MICHAEL P. MALAKOFF

By /s/ Ellen M. Doyle
ELLEN M. DOYLE

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By /s/ John B. Isbister
JOHN B. ISBISTER
Trial Bar No. 00639
201 North Charles Street
Baltimore, Maryland 21201
(301) 752-6100
Attorneys for the Representative
and the Class Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April, 1987, a copy of the foregoing Amended Complaint was hand delivered to Richard Magid, Esquire, Whiteford, Taylor & Preston, 7 St. Paul Street, 1400 Union Trust Tower, Baltimore, MD 21202.

/s/ John B. Isbister
JOHN B. ISBISTER

March 27, 1987

The Baltimore and Ohio Railroad Company
100 North Charles Street
Baltimore, Maryland 21201

NOTICE OF APPROVAL OF MERGER

TO THE SHAREHOLDERS OF THE BALTIMORE AND OHIO RAILROAD COMPANY:

NOTICE IS HEREBY GIVEN of the approval of the proposed merger (the "Merger") of The Baltimore and Ohio Railroad Company, a Maryland corporation ("B&O") with and into The Chesapeake and Ohio Railroad Company, a Virginia corporation ("C&O"), pursuant to a Plan of Merger dated as of December 2, 1986 (the "Merger Agreement"), by and between B&O and C&O.

B&O did not call a shareholders meeting to consider or approve the principal terms of the Merger. Instead, on December 2, 1986, the Board of Directors of B&O, pursuant to Section 3-106 of the Corporations and Associations Article of the Annotated Code of Maryland (the "Maryland Law") and Section 13.1-719 of the Virginia Stock Corporation Act, approved the terms of the Merger. On March 10, 1987, the B&O Board of Directors reviewed their analsyis of the value of the B&O stock and decided that as of March 10, 1987 One Hundred Twenty-Four Dollars ($124.00) per share of common stock, par value One Hundred Dollars ($100.00) per share (the "Common Shares") and One Hundred Dollars ($100.00) per share of preferred stock, par value One Hundred Dollars ($100.00) per share (the "Preferred Shares", together with Common Shares, the "Shares") is the fair value of the Shares and that such price should be paid to the minority shareholders. Under Maryland Law no shareholder vote is required to approve a merger of a ninety percent (90%) or more owned subsidiary into its parent: as of December 2, 1986 and March 10, 1987, C&O owned beneficially and of record in excess of ninety per-

cent (90%) of the Common Shares and Preferred Shares of B&O.

The Merger is expected to be consummated on or after April 30, 1987. Upon consummation of the Merger, each outstanding Share other than Shares owned by C&O and Shares which are held by shareholders who exercise their appraisal rights, if any, as provided in Maryland Law ("Appraisal Shares"), will be converted into the right to receive One Hundred Twenty-Four Dollars ($124.00) in cash, without interest for each Common Share and One Hundred Dollars ($100.00) in cash without interest for each Preferred Share, all as more fully described in the accompanying Information Statement. A copy of the Plan of Merger is attached as Annex A to the Information Statement accompanying this Notice.

This Notice of Approval of Merger, together with the accompanying Information Statement and Annual Report of B&O, constitutes the notice and contains the information required to be sent under Maryland Law regarding the procedure for the merger of a ninety (90%) or more owned subsidiary corporation into its parent corporation under Maryland Law. The price determined by the B&O Board of Directors to represent the fair market value of the Shares is One Hundred Twenty-Four Dollars ($124.00) per Common Share in cash without interest and One Hundred ($100.00) per Preferred Share in cash without interest. Shareholders are referred to the discussion under "Appraisal Rights and ICC Considerations" in the accompanying Information Statement and Annex D thereto for additional information.

THE BALTIMORE AND
OHIO RAILROAD COMPANY

By: /s/ Patricia J. Hunady
PATRICIA J. HUNADY
Corporate Secretary

Baltimore, Maryland
March 27, 1987

THIS TRANSACTION HAS NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE FAIRNESS OR MERITS OF SUCH TRANSACTION OR UPON THE ACCURACY OR ADEQUACY OF THE INFORMATION CONTAINED IN THIS DOCUMENT. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

WE ARE NOT ASKING YOU FOR A PROXY AND
YOU ARE REQUESTED NOT
TO SEND US A PROXY

PLEASE DO NOT SEND IN ANY CERTIFICATES
FOR YOUR SHARES AT THIS TIME

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INTRODUCTION

General

This Information Statement is being distributed to the holders of outstanding shares of Common Stock, par value One Hundred Dollars ($100.00) per share ("Common Shares"), and Preferred Stock, par value One Hundred Dollars ($100.00) per share ("Preferred Shares", together with Common Shares, the "Shares"), of The Baltimore and Ohio Railroad Company, a Maryland corporation (the "Company" or "B&O"), to advise such holders of the merger (the "Merger") of the Company with and into The Chesapeake and Ohio Railway Company, a Virginia corporation (the "C&O") pursuant to a Plan of Merger dated as of December 2, 1986 (the "Plan of Merger"), between the Company and C&O. A copy of the Plan of Merger is attached to this Information Statement as Annex A.

The Company is a subsidiary of C&O, which as of March 26, 1987 owned 95% of the Company's outstanding Common Shares and 99.9% of the Company's outstanding Preferred Shares. C&O, in turn is a wholly-owned subsidiary of CSX Corporation ("CSX"), a Virginia corporation. On December 2, 1986, the Boards of Directors of the B&O and C&O preliminarily approved the Merger of B&O into C&O on the terms and conditions set forth in the Plan of Merger. Under Section 3-106 of the Corporations and Associations Article of the Annotated Code of Maryland and Section 13.1-719 of the Virginia Stock Corporation Act, no shareholder vote is necessary for the approval of a Merger of a ninety percent (90%) or more owned subsidiary corporation into its parent corporation. The Boards of Directors of B&O and C&O approved the final terms of the Merger on March 10, 1987. Therefore, although this information is being provided to you, the Board of Directors of the B&O is not soliciting your proxy.

At the meeting of the B&O Board of Directors on December 2, 1986, the directors voted to call the outstanding Convertible 4½% Debentures Series "A" due January 1, 2010 (the "Debentures") prior to the consummation of the Merger at and for the price of One Thousand Fifteen Dollars ($1,015.00) per One Thousand Dollar ($1,000.00) principal amount of Debentures, plus accrued interest to the redemption date, as provided in the Indenture securing the Debentures. The Company also announced that it adopted the Plan of Merger pursuant to which a minority shareholder would received no less than One Hundred Thirteen Dollars ($113.00) per share of Common Shares and One Hundred Dollars ($100.00) per share of Preferred Shares. The Notice of Redemption was first published on February 10, 1987 and the redemption date was set for March 27, 1987. In addition, as a result of proceedings before the U.S. District Court for the Western District of Pennsylvania, certain debentureholders received an opportunity to convert their debentures into B&O Common Stock and to receive a distribution of Common Stock of Mid Allegheny Corporation ("MAC Stock"). On March 2, 1987, the right to convert and receive B&O Common Stock and MAC Stock terminated. On March 12, 1987, the right of all debentureholders to convert their debentures into B&O Common Stock terminated. As of March 25, 1987, after giving full effect to the dilution of ownership as a result of conversion of Debentures, C&O still owned approximately ninety-six (96%) of the outstanding Common Shares and therefore the Merger is not subject to a vote at a shareholders meeting.

On March 10, 1987, the B&O Board of Directors reviewed the fairness of the price of One Hundred Thirteen Dollars ($113.00) per share of Common Share which was set on December 2, 1986 as the minimum price to be paid to the minority shareholders for their Common Shares. Based on the 1986 B&O financial statements, changes in

market conditions and interest rates and other relevant developments since the December 2, 1986 meeting, the B&O Board of Directors determined that One Hundred Twenty-Four Dollars ($124.00) per Common Share and One Hundred Dollars ($100.00) per Preferred Share is the fair value of such Shares as of March 10, 1987 and that such price would be paid to the minority shareholders of B&O in connection with the Merger.

Notice of Approval; Sources of Certain Information

The Board of Directors of the Company (the "Board of Directors") has fixed the close of business on March 25, 1987 as the date (the "Notice Date") for determination of those shareholders entitled to receive this Information Statement and the accompanying Notice of Approval of Merger. As of the Notice Date, other than shares held by C&O, there were 2,654,495 Common Shares and four Preferred Shares outstanding, held of record by approximately 554 Common shareholders and four Preferred shareholders, respectively.

To the knowledge of B&O, C&O is the only record or beneficial owner of more than five percent (5%) of the outstanding Common or Preferred Shares. As of the Notice Date, no Shares of B&O are beneficially owned by any member of the Board of Directors of B&O or C&O or any of the executive officers of B&O.

All information contained in this Information Statement about B&O and C&O has been supplied by both B&O and C&O.

B&O will bear the cost of preparing and mailing to the shareholders this Information Statement and the accompanying Notice of Approval of Merger.

THE MERGER DESCRIBED IN THIS INFORMATION STATEMENT IS IMPORTANT TO THE COMPANY'S SHAREHOLDERS. UPON THE CONSUM-

MATION OF THE MERGER, THE EQUITY INVESTMENT OF SHAREHOLDERS (OTHER THAN C&O) IN THE BALTIMORE AND OHIO RAILROAD COMPANY WILL CEASE AND WILL BE AUTOMATICALLY CONVERTED INTO THE RIGHT TO RECEIVE ONE HUNDRED TWENTY-FOUR DOLLARS ($124.00) IN CASH FOR EACH COMMON SHARE, WITHOUT INTEREST AND $100.00 IN CASH FOR EACH PREFERRED SHARE, WITHOUT INTEREST. HOLDERS OF SHARES MAY BE ENTITLED TO EXERCISE APPRAISAL RIGHTS IN RESPECT OF SUCH SHARES. (*See*, "Appraisal Rights and ICC Considerations".)

SPECIAL FACTORS

Background and Reasons for The Merger

In December 1985, CSX announced a major restructuring of its major business segments. The transportation and natural resources businesses have been segmented into four (4) strategic areas—transportation, energy, technology and properties which constitute CSX's four (4) major business groups: CSX Transportation; CSX Energy; CSX Properties and CSX Technologies. Concurrently, CSX rail subsidiaries were reorganized into three (3) customer and asset focus units—CSX Distribution Services, CSX Rail Transport and CSX Equipment, collectively known as "CSX Transportation Group". In addition to C&O and B&O, the major CSX controlled railroad companies include CSX Transportation, Inc. (formerly Seaboard System Railroad, Inc.) ("SBD") and Richmond, Fredericksburg and Potomac Railroad Company ("RF&P"). These companies offer single-system service to twenty-two (22) states, the District of Columbia and the Province of Ontario, Canada. CSX also controls American Commercial Lines, Inc., which engages in barging and other water related businesses, Sealand Corporation which engages primarily in ocean container transportation and Chessie Motor Express, Inc., a trucking company. Through these and other business units CSX has interests in natural resources, natural gas pipelines, oil and gas exploration and development, real estate holdings, including resort hotels; and information and communication enterprises; barge lines; and container shipping lines.

The restructuring of the railroad companies is designed to streamline the overall operations of CSX Transportation and to enable each of the railroads to operate more efficiently by combining them into a single entity, thereby profiting from the synergistic effects of operating one company as opposed to separate entities. The

Merger of the B&O into the C&O is one step in this overall process to consolidate the rail companies into one efficient operating company.

The Merger of the B&O into the C&O will remove the administrative burdens of maintaining separate corporate entities, including keeping separate records, when the B&O operationally is already an integral part of CSX Transportation. By maintaining separate corporate entities, each company is required to keep a separate set of books and records. This activity is economically unproductive and the maintenance of separate entities creates a potential conflict of interest in all intercompany transactions because of the existence of minority shareholders in some but not all of the related entities. B&O must structure transactions between it and its affiliates as "arms' length transactions" which in turn require substantial administrative effort and expense. The requirements of separate entities diverts management's attention from more productive and substantive efforts. It is increasingly uneconomical to maintain this system of doing business.

CSX Transportation is expanding its "one-stop shipping" concept in which freight moves on a single transportation waybill. The implementation of the "one-stop shipping" concept is part of a new marketing and advertising campaign designed to improve customer service capabilities. Because of this management focus, the process of allocating revenues and costs to separate legal entities will be more costly than in previous years, particularly in light of the recent "business group" reorganization along functional rather than corporate lines. To avoid continuing the burden of separate accounting and reporting, it is important to effectuate the Merger as soon as possible.

One of the primary benefits of the Merger is reduction in administrative costs. While some of these cost savings will be offset by the loss of B&O's favorable tax treat-

ment in Maryland, there are substantial benefits to this consolidation in that management will be able to focus its attention on running a single system rather than upon the operation of separate and distinct corporate entities.

At the December 2, 1986 Board of Directors meetings, the B&O Board of Directors approved the redemption of the Debentures at the redemption price provided in the indenture. The B&O Board of Directors approved the Merger and set the minimum price to be paid per share to the minority shareholders in the Merger of B&O and C&O so that when the debentures were called, the debentureholders would be able to make an informed choice whether (i) to receive the redemption price, or (ii) to convert their debentures to Common Shares so that they would receive the price set by the Boards of B&O and C&O or (iii) to pursue other remedies including State appraisal remedies, if available, or the revocation of the ICC exemption. *See*, "Appraisal Rights and ICC Considerations". The B&O Board of Directors also announced its intention to pay not less than One Hundred Thirteen Dollars ($113.00) per share cash price so that any debentureholders entitled to receive the Mid-Allegheny stock distribution mandated by the Federal District Court in Pittsburgh would be able to make an informed decision whether or not (i) to take advantage of such distribution and convert their debentures into Common Shares to receive the distribution of Mid-Allegheny stock and B&O Common Shares (knowing the minimum cash price they would receive in the Merger) or (ii) to hold the debentures and receive the redemption price.

On March 10, 1987, th B&O Board of Directors met to discuss whether any interim events between December 2, 1986 and March 10, 1987 justified a different finding as to the fair price to be paid to the minority shareholders. The Board of Directors reviewed a draft of the 1986 audited financial statements of B&O, developments in the stock market since the December 2, 1986 meeting, the

price changes for comparable companies, changes in interest rates, the assumptions underlying the analysis of the valuation of the stock as of December 2, 1986, the status of existing litigation and of litigation filed in connection with the proposed Merger and other relevant factors which relate to the fairness of the Merger. At the request of the B&O Board of Directors, Morgan Stanley & Co., Incorporated ("Morgan Stanley"), an investment banking firm retained by B&O's Board of Directors updated its valuation of the Shares, and gave its opinion that the value of B&O as of March 9, 1987 was Three Hundred Thirty Million Dollars ($330,000,000.00) (assuming full conversion of all Debentures this equals One Hundred Twenty-Three Dollars and Seventy-One Cents ($123.71) per Common Share). The B&O and C&O Boards of Directors unanimously approved payment of One Hundred Twenty-Four Dollars ($124.00) per share of B&O Common Shares and One Hundred Dollars ($100.00) per share of B&O Preferred Shares for all outstanding Shares other than the Shares held by C&O. The B&O Board also set March 25, 1987 as the record date for giving notice of the Merger to minority shareholders, so that all the debentureholders who converted their Debentures into B&O Common Shares would receive notice of the Merger.

Recommendation of B&O's Board of Directors

The Board of Directors of B&O has unanimously authorized and approved the Merger and believes that the Merger is in the best interest of and fair to all of the minority shareholders of B&O. To determine the fair price which should be paid to the minority shareholders, the Board of Directors of B&O retained Morgan Stanley. *See*, "Special Factors—Opinion of Financial Advisor". The B&O Board of Directors instructed Morgan Stanley to determine the fair value of the Common Shares from the standpoint of the minority shareholders in connection with the potential short form Merger of

B&O into C&O. Although B&O management supplied certain information to Morgan Stanley, it specifically refrained from advising Morgan Stanley as to what it believed to be the fair value of the minority Shares or the basis for making such valuation in an effort to ensure that Morgan Stanley's independence was not compromised in any fashion.

In making the determination that the price is fair to the minority shareholders, the B&O Board consulted with its legal advisors as well as the Company's management. Among the factors considered by the B&O Board were the following: (a) the business, prospects and financial condition of the Company; (b) a capitalization of earnings based on a rate derived from stock market levels of comparable companies, business prospects, risks for railroad operations in the Company's territory and the Company's financial position; (c) the dividend history and the ability of the Company to sustain such dividend payments in light of its current financial condition; (d) possible plans to sell one or more short lines of B&O; (e) the litigation filed by minority shareholders in the Pittsburgh Terminal case filed in Ohio and in other cases filed in connection with the Merger; (f) plans to continue property sales and short line sales at the same level; and (g) the opinion of Morgan Stanley. The B&O Board considered but assigned no weight to the book value and liquidation value because (i) there are no plans to liquidate portions of material assets of B&O, other than the proposed sale of one short line and other property in the ordinary course of business as disclosed herein and (ii) the assets of B&O, as a whole, are presently not generating sufficient income to pay for replacement costs and the assets are not generating a return which would justify a price commensurate to their book value.

In light of all the factors considered, the Board of Directors determined to adopt the Plan of Merger and that the price offered to B&O minority shareholders was

the fair value for such shares. In view of the wide variety of factors considered in connection with its evaluation of the fair value of the Common Shares, the Board of Directors did not find it practicable to assign relative weights to the specific factors considered in reaching its decision.

Opinion of Financial Advisor

B&O engaged Morgan Stanley to advise the Board of Directors as to the fair value from the financial point of view of the shares held by shareholders other than C&O in connection with a potential Merger between B&O and C&O. Morgan Stanley is a nationally recognized investment banking firm and is regularly engaged in the evaluation of railroads and other businesses and their securities in connection with mergers and acquisitions, negotiated underwritings and private placements. In addition to Morgan Stanley's retention by B&O as financial advisor to provide its opinions as to the fair value of B&O Common Shares, Morgan Stanley has provided financial services to CSX from time to time and has acted as a co-manager or lead manager on several of CSX's financings in the past few years. Morgan Stanley may seek to provide such services in the future. In addition, from time to time Morgan Stanley maintains a trading position in CSX stock and holds options in CSX stock.

Morgan Stanley presented its findings and valuation to the B&O Board of Directors at the December 2, 1986 B&O Board meeting and at the March 10, 1987 B&O Board meeting. At the December 2, 1986 meeting of the B&O Board, Morgan Stanley delivered its opinion that, subject to the assumptions and limitations set forth therein, the fair value of the B&O Common Shares was approximately Three Hundred Million Dollars ($300,000,000.00) as of October 31, 1986 (assuming full conversion of the outstanding Debentures into B&O Common Shares this would equal approximately One Hundred Thirteen

Dollars ($113.00) per Common Share). At the March 10, 1987 meeting of the B&O Board, Morgan Stanley delivered its opinion that, subject to the assumptions and limitations set forth therein, the fair value of the outstanding Common Shares as of March 9, 1987 was Three Hundred Thirty Million Dollars ($330,000,000.00) (assuming full conversion of the Debentuers into B&O Common Shares, this would equal approximately One Hundred Twenty-Three Dollars and Seventy-One Cents ($123.71) per Common Share).

The full text of such written opinions which set forth, among other things, certain assumptions made, matters considered and limitations of the review undertaken in connection with such opinions, are attached as Annexes B and C hereto and should be carefully read in their entirety.

Neither the B&O's management nor the Board of Directors imposed any limitations upon the scope of the investigation of Morgan Stanley with respect to the rendering of its opinions, except that Morgan Stanley was not authorized to solicit, and did not solicit, potential purchasers for B&O.

For its services, the B&O agreed to pay Morgan Stanley a fee of Two Hundred Thirty-Five Thousand Dollars ($235,000.00), plus all reasonable and necessary out-of-pocket expenses (including the cost of outside counsel) in connection therewith. In addition, the Company has agreed to indemnify Morgan Stanley against all losses, claims, damages and liabilities arising from the engagement of Morgan Stanley by B&O.

Action by B&O and C&O Boards

Under Section 3-106 of the Corporations and Associations Article of the Annotated Code of Maryland and Section 3.1-719 of the Virginia Stock Corporation Act,

the Boards of Directors of B&O and C&O adopted resolutions which approved the proposed Merger on substantially the terms and conditions set forth in the Plan of Merger. On March 10, 1987, the Boards of B&O and C&O affirmed their decision to go ahead with the Merger at the price of One Hundred Twenty-Four Dollars ($124.00) per share of Common Shares and One Hundred Dollars ($100.00) per share of Preferred Shares. On November 26, 1986 and March 25, 1987, C&O owned beneficially and of record over 95% of the Common Shares and Preferred Shares then outstanding. Thus, neither further action by shareholders of the Company nor the consent of any other shareholders of the Company is required to approve the Merger.

Conflicts of Interest

Eleven of the directors of B&O also serve as directors of C&O. As directors of both entities, these individuals may be deemed to have a conflict of interest with respect to the Merger. The officers of B&O also serve as officers of C&O. *See*, "Information About B&O and Post Merger Considerations—Management of B&O". Because of the absence of any arms' length negotiating between B&O and C&O, B&O retained Morgan Stanley as an independent financial adviser to determine the fair value of the outstanding Common Shares on behalf of the minority shareholders. In addition, the Boards of Directors of B&O and C&O were apprised of their fiduciary duty to the minority shareholders. C&O determined to pay the minority shareholders a price which it believed was on the high side of the reasonable range due to the absence of any arms' length negotiations.

None of the directors or officers of CSX, B&O or C&O own any B&O Shares.

Federal Income Tax Consequences of the Merger to Shareholders

The receipt of the cash consideration for Shares pursuant to either the Merger or the exercise of statutory objecting shareholders' rights, if any, under Maryland law (*See*, "APPRAISAL RIGHTS AND ICC CONSIDERATIONS—Rights of Dissenting Shareholders and Summary of Procedure for Appraisal Rights") will be taxable transactions for federal income tax purposes under the Internal Revenue Code of 1986, as amended, and may also be taxable transactions for state, local and other tax purposes. For federal income tax purposes, each shareholder of the Company will realize gain or loss equal to the difference between the amount of cash received in the Merger and his adjusted tax basis for the Shares. Such gain or loss will be capital gain or loss (assuming the Shares are held as capital assets in the hands of such shareholder), and any such capital gain or loss will be long-term if the shareholder has held such Shares for more than one year if said Shares were acquired before June 23, 1984, or for more than six months if such Shares were acquired after June 22, 1984.

Prior to the applicable effective date of the Tax Reform Act of 1986 (the "1986 Tax Act"), in general, if for any taxable year a taxpayer other than a corporation had a net capital gain (the excess of net long-term capital gain over any short-term capital loss), said taxpayer was entitled to a deduction from gross income equal to 60% of the amount of the net capital gain. Effective for taxable years beginning after December 31, 1986, this deduction has been repealed, and a noncorporate taxpayer's long-term capital gain will be taxed as ordinary income. However, the maximum federal income tax rate for noncorporate taxpayers during the first taxable year beginning after December 31, 1986, wil be 28%. For any taxable year beginning after 1987, net capital gains for non-

corporate taxpayers will be taxed under the same tax rates as ordinary income. For years beginning in 1988 and thereafter, certain income could be taxed at 33% because a 5% surtax phases out the benefit of the lower 15% rate for certain non-corporate taxpayers at prescribed income levels, and then phases out the tax benefits obtained from the personal and dependency exemptions. Even though some income, including net capital gains could be taxed as high as 33% for these years, the maximum overall effective tax rate would be 28%.

Under the 1986 Tax Act, a taxpayer other than a corporation, may still deduct capital losses in full against capital gains. The $3,000 limitation on the deduction of net capital losses against ordinary income is retained. However, pursuant to the 1986 Tax Act for taxable years beginning after December 31, 1986, a dollar of long-term capital loss will now be able to offset a full dollar of ordinary income up to the $3,000 limit. The two-for-one offset previously set for net long-term capital gains is eliminated. Any capital losses not fully used may be carried forward.

Prior to the applicable effective date of the 1986 Tax Act, an alternative tax rate of 28% was applicable to a corporation's net capital gain if the alternative tax would be lower than the tax calculated by using the regular graduated rates. For corporate years that commenced prior to July 1, 1987, corporate long-term capital gains includable in income after December 31, 1986, will be subject to a maximum ordinary or alternative tax rate of 34%. For years commencing on or after July 1, 1987, the maximum rate for all corporate income will be 34%.

THE TAX DISCUSSION SET FORTH ABOVE IS INCLUDED FOR GENERAL INFORMATION ONLY. IN VIEW OF THE INDIVIDUAL NATURE OF TAX CONSEQUENCES, EACH SHAREHOLDER IS URGED TO CONSULT HIS OWN TAX ADVISOR AS TO THE

PARTICULAR TAX CONSEQUENCES OF THE MERGER TO HIM, INCLUDING THE EFFECT AND APPLICABILITY OF FEDERAL, STATE, LOCAL AND OTHER TAX LAWS.

Third Party Offers and Sale of Assets

The Management and Board of Directors of B&O are not aware of any third party offers to purchase control of the stock of B&O or a material portion of the assets of B&O. B&O plans to offer for sale a line of railroad consisting of approximately 373 route miles (563 track miles) which amounts to 7% of B&O's route miles (6% of B&O's track miles). At this time, B&O has not received any third party offers to purchase said line. *See*, "Information about B&O and Post Merger Considerations."

THE MERGER

Terms of the Merger

The following information about the Plan of Merger is qualified in its entirety by reference to the Plan of Merger, a copy of which is attached as Annex A to this Information Statement. Some time shortly after thirty (30) days from the date that this Information Statement is mailed to the shareholders of B&O, B&O shall cause Articles of Merger to be filed with the State Department of Assessments and Taxation of Maryland and the State Corporation Commission of Virginia (the "Effective Date"). Following the filing of such Articles of Merger, B&O's assets will be wholly owned by C&O. Each Common Share outstanding at the Effecitve Date, other than those held by C&O or dissenting shareholders of B&O who take appropriate action to perfect their appraisal rights, if any, under Maryland law, will be converted into the right to receive One Hundred Twenty-Four Dollars ($124.00) in cash; each Preferred Share outstanding at the effective date, other than those held by C&O or dissenting shareholders of B&O who take appropriate action to perfect the appraisal rights under Maryland law, if any, will be converted into the right to receive One Hundred Dollars ($100.00) in cash. *See*, "Appraisal Rights and ICC Consideration."

Each Share of B&O Common Shares and B&O Preferred Shares held by C&O on the effective date and each Share of capital stock held in treasury on the effective date shall be cancelled.

The payments which will be required to be made to the holders of the Common Shares and Preferred Shares in the Merger will total approximately Fifteen Million One Hundred Thirty-Five Thousand Four Hundred Forty Dollars ($15,135,440). C&O will pay these funds from its cash reserves or will obtain all or part of these funds by advances from CSX.

Payment for Shares

On the Effective Date, each outstanding certificate which prior thereto represented an issued and outstanding share of Common Shares or Preferred Shares will be deemed for all purposes to represent the right of the holder (other than C&O and holders who take the appropriate action to perfect appraisal rights or other rights, if any) to receive One Hundred Twenty-Four Dollars ($124.00) per Common Share in cash and One Hundred Dollars ($100.00) per Preferred Share in cash.

In order to receive the cash payments for Shares to which the Company's shareholders will be entitled as a result of the Merger, each holder of Shares will be required to surrender his or her stock certificate(s) together with a duly executed letter of transmittal to Patricia J. Hunady, Corporate Secretary, The Chesapeake and Ohio Railway Company, 100 North Charles Street, Baltimore, Maryland 21201. Upon receipt of such certificate(s), together with a duly executed letter of transmittal, a check will be mailed to the registered owner in an amount of One Hundred Twenty-Four Dollars ($124.000) in cash for each Common Share represented by such certificate(s) and One Hundred Dollars ($100.00) in cash for each Preferred Share represented by such certificate(s).

Instructions with regard to the surrender of stock certificate(s), together with a letter of transmittal to be used for this purpose, will be forwarded to B&O shareholders within two (2) business days after the Effective Date of the Merger, Shareholders should surrender certificates for shares only after receiving a letter of transmittal.

Each certificate which, prior to the Effective Date, represented shares, other than shares held by C&O, represents only the right to receive the amount of cash to which the shares represented thereby shall have been con-

verted. No interest will be paid or accrued on the amount payable upon the surrender of any certificate.

If any payment for any Shares is to be made in a name other than that in which the certificate(s) for Shares surrendered for payment is registered on the stock transfer books of B&O as of the Effective Date, it will be a condition of such payment that the ceritficate(s) so surrendered shall be properly endorsed or otherwise in proper form for transfer and that the person requesting such payment shall pay to C&O any transfer or other tax required by reason of the payment to a person other than the registered holder of the certificate(s) so surrendered.

The Merger Agreement may be terminated by mutual consent of the Boards of Directors of B&O and C&O or may be amended by the majority vote of the Board of Directors of B&O and C&O. No amendment may be made which reduces the amount or changes form of consideration to be received by the shareholders of the B&O in the Merger.

Financing

The total amount of funds required by C&O to purchase the outstanding shares and to pay related fees, costs, and commissions is estimated to be approximately Fifteen Million Five Hundred Sixty-Five Thousand Four Hundred Dollars ($15,565,400). B&O's transaction costs in this Merger are estimated to be approximately $430,000. C&O will pay these funds from its cash reserves or will obtain all or part of these funds by advances from CSX.

APPRAISAL RIGHTS AND ICC CONSIDERATIONS

Rights of Dissenting Shareholders

Holders of Shares may have the right under Subtitle 2 of the Corporations and Associations Article of the Maryland Annotated Code, subject to certain conditions, to receive in cash the fair market value (as mutually agreed upon by C&O and dissenting shareholders or as judicially determined) of their shares by complying with the applicable statutory requirements. The pertinent provisions of the Maryland Law are reprinted in their entirety as Annex D to this Information Statement. Shareholders who fail to take action required by such provisions in a timely and proper manner will lose any appraisal rights they may have under Maryland Law. A summary of the procedures to be followed to exercise appraisal rights is described below.

Notwithstanding any contrary provisions of state corporate law and procedures, the Interstate Commerce Commission (the "ICC") has exclusive jurisdiction to review and approve railroad mergers. The ICC's formal review and approval of a railroad merger preempts inconsistent state laws governing corporate mergers and in particular extinguishes any state law rights of dissenting shareholders to obtain a valuation or an appraisal of their shares. The Merger described herein is not subject to prior review and approval by the ICC. The ICC has exempted from the requirement to obtain its prior review and approval certain "corporate family" mergers involving railroads. The Merger described herein qualifies as such an exempt "corporate family" transaction. B&O's special counsel, Sidley & Austin, has advised B&O that it is unclear whether the ICC's treatment of the Merger as an exempt transaction not subject to review and approval preempts state appraisal rights of dissenting shareholders. Accordingly, assuming that the ICC does not, either

on its own motion or at the request of an interested party, revoke the "corporate family" exemption with respect to the Merger, it has not been conclusively determined that the Maryland appraisal rights are available to B&O dissenting shareholders. STOCKHOLDERS INTERESTED IN PURSUING AN APPRAISAL REMEDY, IF ONE IS AVAILABLE, SHOULD TAKE WHATEVER STEPS ARE NECESSARY TO PERFECT SUCH APPRAISAL RIGHTS SO THAT THEY ARE NOT PRECLUDED FROM PURSUING THIS REMEDY IN THE EVENT A COURT FINDS THE ICC'S JURISDICTION IS NOT EXCLUSIVE.

In accordance with ICC regulations, B&O will qualify for the "corporate family" exemption by filing a notice of exemption with the ICC at least one week before the Merger is consummated.

Summary of Procedures with Respect to the ICC

A minority shareholder or other interested person of B&O may petition the ICC to revoke its exemption of the Merger and request the ICC to grant review and approval of the transaction, including a determination of the fair value of the Shares. Petitions to revoke the exemption may be filed at any time after the notice of exemption is filed and should be addressed to The Secretary of the ICC, Washington, D.C. 20423. The filing of a petition to revoke the exemption will not stay the consummation of the Merger.

Summary of Procedure for State Appraisal Rights

The following discussion is a summary of the procedures to be followed by each shareholder who desires to pursue his appraisal rights, if such rights are available under Maryland law. It is not a complete statement of the law pertaining to appraisal rights under Maryland law as interpreted by the Maryland courts and is quali-

fied in its entirety by reference to the relevant provisions of Maryland law attached to the Information Statement as Annex D, and by reference to relevant case law. Shareholders of the Company who are contemplating the exercise of appraisal rights should review carefully the provisions of the Maryland law, since a failure to comply with any of the relevant stattuory requirements will result in a loss of any such rights which may be available. Any person having a beneficial interest in Shares which are held of record in the name of another person and who is entitled to and desires to exercise appraisal rights in respect of such Shares should cause the record holder to follow properly the steps summarized below in a timely manner to perfect appraisal rights which may be available in respect of such Shares. The failure to take these actions properly and in a timely fashion will result in the loss of appraisal rights which may be available under Maryland law.

Within thirty (30) days after the date hereof, the shareholder must file a written objection to the Merger with B&O (if done by mail, then registered or certified mail, return receipt requested is recommended). SUCH OBJECTION MUST BE RECEIVED BY B&O, 100 NORTH CHARLES STREET, BALTIMORE, MARYLAND 21202, ATTENTION: PATRICIA J. HUNADY, CORPORATE SECRETARY, NOT LATER THAN APRIL 29, 1987. *See*, Corporations & Associations § 3-203(a)(1)(i), Md. Ann. Code.

C&O shall promptly notify each objecting shareholder who has filed a written objection with B&O in writing of the date that the Articles of Merger are accepted for record by the Department of Assessments and Taxation. Within twenty (20) days after the Department of Assessments and Taxation accepts the Articles of Merger for record, the objecting shareholder must make a written demand on C&O for the payment of his shares stating the number and shares for which he demands payment. *See*,

Corporations & Associations § 3-203(a)(3), Md. Ann. Code. A demand for payment may be withdrawn only with the consent of C&O. § 3-205.

Within fifty (50) days after the Department of Assessments and Taxation accepts the Articles of Merger for record an objecting shareholder who has not received payment for his Shares may petition a Court of Equity in the Circuit Court for Baltimore City for appraisal to determine the fair value of such Shares. § 3-208. Thereafter the Court may require the objecting shareholder to submit his Shares for notation on them that an appraisal proceeding is pending. § 3-209.

If the Court finds that an objecting shareholder is entitled to appraisal and that the Court has jurisdiction to review an appraisal proceeding in light of the ICC's exemption of the proceeding from its review process, the Court will appoint three (3) disinterested appraisers to determine the fair value of the shares on the terms and conditions the Court considers proper. § 3-210(a). Within sixty (60) days after the appointment of the appraisers, unless such time is extended by the Court, the Court appointed appraisers shall determine the fair value of the Shares and file a report as to that value. § 3-210(b)

Within fifteen (15) days after the appraisers' report is filed, any party objecting to that report may request a hearing. § 3-210(d)(2). The Court may then consider the report and either confirm or modify such findings. The Court may also reject the appraisers' report and determine the fair value on its own and enter judgment for the shareholders or remit the proceeding to the same or other appraisers on terms and conditions that the Court believes is proper. §§ 3-211(a) and (b).

The judgment by the Court shall include interest from the date of this Information Statement unless it finds that the shareholders' failure to accept the offer was

"arbitrary and vexatious or not in good faith." § 3-211(c). Furthermore, the Court may direct that the cost of the appraisal proceeding be apportioned and assessed against any objecting shareholders if it finds that the shareholders' failure to accept the offer was arbitrary and vexatious or not in good faith. If the Court, on the other hand, finds that the shareholders objected in good faith, it may assess the cost of the proceeding including compensation and expenses of the appraisers against C&O. Reasonable fees and expenses for experts may be included in costs of the proceedings only in limited circumstances. Each party must bear his own cost for attorney's fees and expenses.

CERTAIN LITIGATION RELATING TO THE MERGER

On or about April 13, 1984, the case of *Pittsburgh Terminal Corporation, derivatively for the defendant, The Baltimore and Ohio Railroad Company* v. *The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company and CSX Corporation* and certain directors of B&O and C&O was filed in the United States District Court for the Northern District of Ohio Civil Action No. C84-1267. The Complaint purported to be a derivative action in which the plaintiff, a minority shareholder of B&O, claimed, among other matters, that C&O took improper advantage of its controlling interest in B&O when Western Maryland Railway Company (the "Western Maryland Railway") entered into a plan of merger pursuant to which it became a wholly owned subsidiary of C&O and when Western Maryland Railway and B&O entered into an operating agreement. In the Complaint, the plaintiff requested rescission of the merger of Western Maryland Railway and Peakbay Corporation, a wholly-owned subsidiary of C&O, rescission of the operating agreement between Western Maryland Railway and B&O, rescissionary damages, costs, attorneys' fees and other relief which the Court deemed appropriate. Trial was held before the Court in October 1986. Defendants vigorously opposed the action and management believes that it has presented meritorious defenses. The parties are currently awaiting a decision of the Court. The Merger may render this case moot.

On December 18, 1986, January 16, 1987 and January 19, 1987, respectively, Walter J. Schloss Associates, Leon Lustig and Sue Freedman filed separate suits, individually and purportedly on behalf of a class of B&O minority shareholders and/or convertible debentureholders, in the Circuit Court for Baltimore City, Maryland against B&O, C&O and CSX. The three (3) suits have ben consolidated under Index No. 86351020/CE59400, and a

Consolidated Amended Complaint was filed on March 11, 1987. The Consolidated Amended Complaint challenges the fairness of the pending Merger of B&O into C&O and alleges, among other things, that B&O, C&O and CSX breached fiduciary duties allegedly owed to B&O's minority shareholders in connection with an alleged scheme to deprive minority shareholders of B&O of their alleged rights to participate in the growth and appreciation of B&O. Among other matters plaintiffs contend: that the price per Common Share to be paid to the B&O minority shareholders in connection with the Merger of B&O is inadequate; that in transferring non-rail assets to Mid-Allegheny Corporation, a subsidiary of B&O, CSX, through its predecessor, Chessie System, Inc., and C&O wrongfully deprived B&O convertible debentureholders of participation in those assets; that in selling Western Maryland Railway to C&O, B&O wrongfully deprived its minority of participation in those assets; that through excessive and improper costs, including intercorporate transactions, B&O and its minority were wrongfully deprived of full earnings; and that the Merger of B&O into C&O is part of a scheme to deprive B&O's minority of the opportunity to participate in the growth of B&O. A hearing on plaintiffs' request for certification of a class together with defendants' motion to dismiss is scheduled on April 13, 1987 before Judge Joseph H. H. Kaplan. The Consolidated Amended Complaint seeks, among other things, to enjoin the Merger; to revoke or rescind the Merger if it is consummated; an accounting by the defendants to the purported class; and an award of unspecified money damages as well as attorneys' fees. The defendants believe that this consolidated action is without merit and intend to defend it vigorously.

On or about March 2, 1987 the case of *Margaretha Walk, et al.* v. *The Baltimore and Ohio Railroad Company, The Chesapeake and Ohio Railway Company and CSX Corporation*, Civil Action No. S-87-488 was filed in

the United States District Court for the District of Maryland. In this case, plaintiffs assert that they are minority shareholders of B&O suing on behalf of themselves and as representatives of a proposed class of minority shareholders of B&O. Plaintiffs allege that they are entitled to recover against defendants under Sections 1964(c) and 1962(a) of the Racketeer Influenced and Corrupt Organizations Act and also allege that defendants have breached fiduciary duties owed to plaintiffs resulting from certain conduct and actions taken by defendants both prior to and in connection with the present Merger. Among other matters plaintiffs contend: that the price per Common Share to be paid to the B&O minority shareholders in connection with the Merger of B&O into C&O is inadequate; that through its dividend policy and its purchase of the Debentures, B&O has attempted to coerce debentureholders to sell their Debentures at less than face value; that in transferring non-rail assets ot Mid-Allegheny Corporation, a subsidiary of B&O, CSX, through its predecessor, Chessie Systems, Inc., and C&O wrongfully deprived B&O convertible debentureholders of participation in those assets; that in selling Western Maryland Railway Co. to C&O, B&O wrongfully deprived its minority of participation in those assets; that through excessive and improper costs, including intercorporate transactions, B&O and its minority were wrongfully deprived of full earnings; and that the Merger of B&O into C&O is part of a scheme to deprive B&O's minority of the opportunity to participate in the growth of B&O. Plaintiffs seek injunctive relief, damages, including treble damages, attorneys' fees and costs against defendants.

Defendants have reviewed plaintiffs' allegations in this case and believe that they are incorrect. Defendants are taking appropriate legal action to oppose plaintiffs' claims.

In the event that the Courts determine that either the above-described *Schloss* case or the *Walk* case should proceed as a class action, a B&O shareholder may possibly be precluded by law from pursuing statutory appraisal under Maryland law and also participating as a member of such a class action. Each B&O shareholder who is part of any class that is certified will receive notice of the class certification. This notice will state the time by which any shareholder must opt out of the class which has been certified. Because the time period for exercising appraisal rights may occur prior to a Court determination as to whether the *Schloss* case or the *Walk* case should proceed as a class action, it is possible that a B&O shareholder could be faced with the dilemma of complying with the relevant statutory requirements for seeking an appraisal before he knows if he is a member of a class of B&O shareholders in either the *Walk* or the *Schloss* case. In order to avoid this dilemma, C&O, as successor to B&O, agrees, pursuant to Section 3-205 of the Corporations and Associations Article of the Maryland Code, to consent to a withdrawal of a demand for payment by any B&O shareholder who has perfected his appraisal rights, as they may exist, and who desires to pursue class relief in lieu of seeking appraisal; provided, however, that such shareholder must give written notice to C&O of his desire to revoke his demand for payment at some time prior to the time specified in the notice of the class action for opting out of the class. Any request to withdraw a demand for payment may be sent to Patricia J. Hunady, Corporate Secretary, The Chesapeake and Ohio Railway Company, 100 North Charles Street, Baltimore, Maryland 21201. *See generally*, "Appraisal Rights and ICC Considerations". *See also*, "The B&O 1986 Annual Report and Form 10-K—Item 3".

INFORMATION ABOUT B&O AND POST MERGER CONSIDERATIONS

Conduct of C&O's Business After the Merger and Other Post-Merger Matters

Other than as described herein, following the Merger, C&O intends to continue to manage the business previously conducted by B&O. C&O also intends to merge with the CSX Transportation, Inc. (formerly "Seaboard System Railroad, Inc."). C&O, which will then change its name to CSX Transportation, Inc., will then control the present operations of CSX Transportation, Inc., B&O and C&O in a single entity as part of its overall restructuring of its major business segments.

There are no plans to sell or transfer material amounts of the assets of the B&O other than set forth herein. *See* "Special Factors—Third Party Offers and Sale of Assets". Property sales and short line sales have been an important part of the B&O's plant rationalization plan over the past few years and other than the potential sale of the short line described herein, are expected to continue into the future at much the same level. *See*, "Special Factors—Third Party Offers and Sale of Assets."

B&O, ceasing to exist as a separate entity, will pay no dividends in the future. C&O, to the extent deemed prudent by the C&O Board of Directors, will declare dividends to its parent, CSX, some of which may be a result of profits from former B&O operations. The debts of B&O will be assumed by C&O and the capital of B&O will be added to C&O's under the Plan of Merger.

As a consequence of the Merger, C&O will assume all of B&O's outstanding obligations, including but not limited to B&O's outstanding issues of First Consolidated Mortgage Bonds Series "C" and Series "G".

As a consequence of the Merger, B&O will no longer be subject to reporting requirements under the Securities Exchange Act of 1934.

Selected Consolidated Financial Information of B&O

For information on Selected Financial Data, *see*, The B&O 1986 Annual Report and Form 10-K, a copy of which is Annex E attached hereto.

Management and Discussion and Analysis

For information on the Management Discussion and Analysis, *see*, The B&O 1986 Annual Report and Form 10-K, a copy of which is Annex E attached hereto.

Management of B&O

For information on the Management of B&O, *see*, The B&O 1986 Annual Report and Form 10-K, a copy of which is Annex E attached hereto.

Description of B&O's Capital Stock

Description of Preferred Shares. The authorized Preferred Shares of B&O consists of 600,000 Shares, of which C&O owns 599,694 Shares, 302 Shares are held in treasury, and the remaining four Shares are held by minority shareholders. The Preferred Shares were created pursuant to a resolution of the Board of Directors on April 10, 1899.

Preferred Shares are entitled to a noncumulative dividend at the rate of four percent (4%) per annum before the payment of any dividend on the Common Shares, but Preferred shareholders shall have no lien on the B&O for failing to pay and such dividend. Other than a dividend preference, the Preferred shareholders are not entitled to any liquidation preference or voting rights, except however the majority of the Preferred shareholders have the right to vote on increases in the issuance of such Preferred Shares.

Description of Common Shares

The authorized Common Shares of B&O consists of 5,796,076 Common Shares, of which as of March 26, 1987, 2,682,442 Common Shares are issued and 2,654,495 Common Shares are outstanding. All Shares of Common Shares presently outstanding are fully paid and non-assessable. The following is a brief summary of certain provisions with respect to the Common Shares:

Dividend Rights. B&O has paid a cash dividend of Eight Dollars ($8.00) per share of Common Shares each year, since 1979. Payment of dividends is within the discretion of the Board of Directors and depends on the consolidated earnings and financial position of B&O, availability of funds for the payment of dividends and other relevant factors. In the opinion of Management, the dividend rate presently paid may not be sustainable and in any event is not likely to increase.

Voting Rights. Each outstanding Share is entitled one vote. There are no cumulative voting rights.

Liquidation and Other Rights. In the event of any dissolution, liquidation or winding up of affairs of B&O, the holders of the Common Shares are entitled to share pro rata in any assets of B&O remaining after satisfaction of all corporate liabilities.

Transfer Agent. Mercantile-Safe Deposit & Trust Company, Baltimore, Maryland acts as the transfer agent for the Common Shares.

ADDITIONAL INFORMATION

Current Information and Deregistration

B&O is presently subject to the information filing requirements of the Securities Exchange Act of 1934, as amended, and in accordance therewith is obligated to file reports and other information with the Securities and Exchange Commission (the "Commission") relating to its business, financial condition and other matters. Information, as of particular dates, concerning the Company's directors and officers, their remuneration, options granted to them, the principal holders of the Company's securities and any material interest of such persons in transactions with the Company or its affiliates is required to be disclosed in proxy statements distributed to the Company's sharesholders and filed with the Commission. Such reports, proxy statements and other information may be inspected at the Commission's office at 450 Fifth Street, N.W., Washington, D.C. 20549, and should also be available for inspection and copying at the regional offices of the Commission located at Room 1024, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604; Room 1102, Jacob Javits Federal Building, 26 Federal Plaza, New York, New York 10278; and Suite 500 East, 5757 Wilshire Boulevard, Los Angeles, California 90036. Copies of such material may also be obtained by mail, upon payment of the Commission's customary fees, from the Commission's principal office at 450 Fifth Street, N.W., Washington, D.C. 20549.

After the Merger is consummated, under the Exchange Act, B&O will not be required to file periodic reports, as it no longer will exist as a separate entity.

Fees and Expenses

It is estimated that the expenses of the Merger paid or payable by B&O, other than expenses relating to litiga-

tion filed in connection with the Merger are as set forth below:

Morgan Stanley Fees	$235,000
Legal Fees	175,000
Printing Costs	10,000
Accounting Fees and Expenses	10,000
Total	$430,000

Independent Public Accounts

Ernst & Whinney has acted as independent public accountants for B&O since 1981.

Legal Counsel

Whiteford, Tayor & Preston has acted as counsel for B&O inconnection with certain matters relating to the Merger. Sidley & Austin has acted as special counsel to B&O in connection with certain matters relating to the Interstate Commerce Act.

THE BALTIMORE AND
OHIO RAILROAD COMPANY

Baltimore, Maryland
March 27, 1987